(28,442)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 487.

PANAMA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES ROCK.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 4, 1921.

a UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and Proceedings Had and Done at a Regular Term of the United States Circuit Court of Appeals for the Fifth Circuit, Begun on the Third Monday in November, A. D. 1920, at New Orleans, Louisiana, Before the Honorable Richard W. Walker, the Honorable Nathan P. Bryan, and the Honorable Alex. C. King, Circuit Judges.

PANAMA RAILROAD COMPANY, Plaintiff in Error,

versus

JAMES ROCK, Defendant in Error.

Be it remembered, That heretofore, to wit, on the 9th day of September, A. D. 1920, a transcript of the record in the above styled cause, pursuant to a writ of error to the District Court of the Canal Zone, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 3567, as follows, to-wit:

UNITED STATES OF AMERICA, CANAL ZONE.

DISTRICT COURT OF THE CANAL ZONE, DIVISION OF BALBOA, TO-WIT:

At a regular term of the United States Court for the Canal Zone, Division of Balboa, begun and held at the Court House in the City of Ancon, on the thirteenth day of May, in the year of our Lord, 1920:

Present:

The Honorable John W. Hanan, District Judge for the Canal Zone, presiding;

Messrs. W. C. Todd and W. C. MacIntyre, Attorneys for the Plaintiff;

Judge Frank Feuille, and Mr. Walter F. VanDame, Attorneys for the defendant.

Among others were the following proceedings, to-wit:

COMPLAINT.

United States of America.

In the District Court, Division of Balboa, District of the Canal Zone.

JAMES ROCK, Plaintiff,

vs. No. 310 Civil.

THE PANAMA RAILROAD COMPANY, A CORPORATION, Defendant.

Complaint.

Plaintiff complains of defendant and for his cause of action alleges:

1. That plaintiff is a resident of the town of Gatun, Canal Zone, and is the only surviving heir at law of Rachael Rock, plaintiff's deceased wife, and plaintiff brings this action for himself and in his capacity as heir of the said Rachael Rock, deceased; and that the defendant is a corporation, organized and existing under and by virtue of the laws of the State of New York, U. S. A. and is a common carrier by railroad within the Panama Canal Zone, and at all times hereinafter mentioned defendant was such common carrier of persons and property for hire, and was the owner and in possession of the cars, train of cars and railroad tracks hereinafter mentioned and during all such times was, and still is, engaged in operating said cars and trains of cars over said tracks from the City of Panama, Republic of Panama, through and across the Panama Canal Zone, to the City of Colon, Republic of Panama, and intermediate points within the Canal Zone; and defendant owns property, real, personal, and mixed, and is doing business and maintains offices, and has its managing officers and officials within the said Panama Canal Zone, and the cause of action herein set forth and made the basis of this action, arose within the territorial jurisdiction of of the Balboa Division of the United States District Court for the Canal Zone.

2. That at all times hereinafter mentioned plaintiff was the lawful husband of Rachael Rock, now deceased, as hereinafter more fully appears, and was living together with his said wife in the town of Gatun, Canal Zone, and plaintiff now is the legal heir of the said Rachael Rock, deceased, and is the only surviving heir at law of the said Rachael Rock, deceased.

3. That on the 20th day of May, 1918, at defendant's regular passenger station or depot, in the City of Panama,

Republic of Panama, plaintiff's decedent, the said Rachael Rock, for the usual and customary cash consideration which was then and there paid by plaintiff's said decedent unto defendant, purchased from defendant a certain railroad ticket, by the terms of which, defendant, in consideration of the payment unto defendant by plaintiff's decedent of the purchase price of said ticket, as aforesaid, promised and agreed and undertook to safely carry plaintiff's said decedent, Rachael Rock, as a passenger in a second-class coach or car of one of defendant's regular passenger trains, from the City of Panama, Republic of Panama, through and across the Canal Zone to the town of Gatun, Canal Zone; and at or about the hour of 5:00 o'clock p. m. of said day, plaintiff's said decedent tendered and presented said ticket, purchased as aforesaid, to the conductor or collector of one of Defendant's regular passenger trains, at defendant's regular passenger station or depot in the city of Panama; and defendant's said conductor or collector duly collected, received and accepted said ticket, so presented as aforesaid, and permitted and invited plaintiff's said decedent to go aboard and enter a second-class coach or car of one of defendant's regular passenger trains, bound for and toward Gatun, Canal Zone, to be carried as such passenger, as aforesaid; and plaintiff's said decedent did then and there go aboard and enter said second-class coach or car of defendant's said train and became a passenger thereon, and it then became the duty of defendant to safely carry plaintiff's decedent, Rachael Rock, as a passenger upon said train, from the City of Panama, R. of P., to the town of Gatun, Canal Zone.

4. That while Rachael Rock, plaintiff's decedent, was as such passenger on said coach or car of defendant's said train, and being so conveyed thereon, the defendant

company and its servants and employees, so negligently conducted itself and themselves in the operation and management of said train of cars, and in having its tracks so unskillfully and improperly constructed, and in using unsafe and improper equipment, to-wit; two refrigerator cars, in said train of cars whereon plaintiff's decedent was then being conveyed as a passenger as aforesaid, as to cause the derailment of said train of cars, at or near a place known as Gamboa, within the Canal Zone, about twenty miles, more or less, north of the city of Panama, and about twenty miles, more or less, south of the city of Gatun, the destination of plaintiff's said decedent.

5. That by said derailment of defendant's said train of cars, caused as aforesaid, the coach or car wherein plaintiff's said decedent, Rachael Rock, was riding as a passenger, was suddenly and violently thrown from the tracks while said train was being operated by defendant at a great and dangerous rate of speed upon a down grade and at a curve; and by being so thrown from the tracks the said car was overturned, broken up and wrecked, whereby Rachael Rock, plaintiff's said decedent, received great and severe bodily injuries from which she suffered great and severe bodily, physical pain and great mental anguish, and from which said injuries, received as aforesaid, the said Rachael Rock, plaintiff's said wife and decedent, did die upon the said day of May 20, 1918; and Rachael Rock, plaintiff's said decedent, was entirely without fault or contributory negligence upon her part, and her said injuries, suffering, pain and death were directly caused by the negligence of defendant, as aforesaid.

6. That at the time of her said death, caused by the negligence of defendant, as aforesaid, Rachael Rock, plaintiff's decedent, was a strong, healthy woman, thirty-nine

years of age, and was living together and with plaintiff and was rendering services unto plaintiff of the
3 value of Forty-five dollars ($45.00) per month; and by the said death of Rachael Rock, plaintiff has been deprived of the said services of his said wife, which would otherwise reasonably have continued for a period of fifteen years more to come; and plaintiff has been deprived of the company and society of his said wife forever, in all of which plaintiff has been damaged in the sum of Ten Thousand Dollars, ($10,000.00); and plaintiff, as heir at law of the said Rachael Rock, deceased, asks further for judgment for the injuries suffered by the said Rachael Rock, as aforesaid, in the sum of Five Thousand Dollars, ($5,000.00), or a total sum of Fifteen Thousand Dollars, ($15,000.00).

Therefore, plaintiff prays judgment of and against the defendant, in and for the sum of Fifteen Thousand Dollars, ($15,000.00), and for his costs.

WM. C. MACINTYRE,
W. C. TODD,
Attorneys for Plaintiff.

Filed April 10, 1919, in the office of the Clerk of the District Court, Canal Zone.

E. M. GOOLSBY, Clerk.

PROCESS.

The Panama Canal.

In the District Court in and for the Division of Balboa, Canal Zone.

James Rock, Plaintiff,
vs.
The Panama Railroad Company, a Corporation, Defendant.

Summons for Relief.

To the Panama Railroad Company, a Corporation:

You are hereby required to enter your appearance in the Clerk's office of the above-named Court at Ancon, C. Z. in the said Canal Zone within ten days after the service of this summons upon you, exclusive of the day of such service, if it is served upon you in said Canal Zone; otherwise within forty days; and to answer the complaint of the plaintiff, a copy of which is hereto attached and herewith served upon you, within the time fixed by the rules of the said Court, which shall be at the next regular session of said Court after the expiration of said ten days.

If you fail to appear within the time aforesaid, the plaintiff will take judgment against you by default and demand from the said Court the relief applied for in said complaint.

Witness the Honorable John W. Hanan, Judge of said Court this the 10th day of April, 1919.

E. M. GOOLSBY, Clerk of the Court.

Marshal's Fees:
Service, $1.00
Mileage .10

$1.10

Seal of the District Court, Canal Zone.

4 MARSHAL'S RETURN OF PROCESS.

No. 310 Civil—Jas. Rock—vs.—P. R. R. Co.

Summons for Relief.

Return of Service.

I have this day served a copy of the within complaint and process upon the within named Panama Railroad Co., at Balboa Heights, by leaving a copy of Summons and Complaint with C. W. Lee, Clerk, for S. W. Heald, Supt. Dated this 16 day of April, 1919.

MIGUEL A. OTERO,
U. S. Marshal.

By FRANK T. HAMLIN, Deputy.

DEMURRER.

United States of America, Canal Zone.

In the United States District Court, District of the Canal Zone, Balboa Division.

James Rock, Plaintiff,

vs. Civil No. 310.

Panama Railroad Company, a Corporation, Defendant

Demurrer.

Comes now the defendant Company, by its attorneys, Frank Feuille and Walter F. Van Dame, and demurs to plaintiff's complaint on the ground that said complaint does not state facts sufficient to constitute a cause of action against the defendant Company, and especially because under the substantive law of the Canal Zone there is no statute or law which confers an action for damages for wrongful death, nor does any statute or law specify the party who would be authorized to sue and recover therefor. (Ursulina Lebert vs. Pacific Mail S. S. Co., District Court of the Canal Zone; and 249 Fed. 349).

PANAMA RAILROAD COMPANY,
A Corporation, Defendant.

By FRANK FEUILLE,
WALTER F. VAN DAME,
Its Attorneys.

Filed September 24, 1919, in the office of the Clerk of the District Court, Canal Zone.
E. M. GOOLSBY, Clerk.

MINUTES.

James Rock,
vs. No. 310. Damages.
Panama Railroad Co.

5 October 22, 1919.

This day the parties to this action are in open Court by their attorneys respectively and the opinion of the Court having been this day read in open Court overruling the defendant's demurrer heretofore filed and heard herein, the defendant by counsel notes its exception to the said opinion and judgment and to each specification thereof.

OPINION OF THE COURT IN OVERRULING DEMURRER TO THE COMPLAINT.

United States of America.

In the United States District Court in and for the Canal Zone, Division of Balboa.

Camila Castilla, Plaintiff,
vs. No. 292.
The Panama Railroad Company, a Corporation, Defendant.

James Rock, Plaintiff,
vs. No. 310.
The Panama Railroad Company, a Corporation, Defendant.

Opinion of the Court Overruling Demurrers to the Complaints.

Both these cases are brought against the Panama Railroad Company, a corporation of New York, operating a

railroad from the City of Panama, in the Republic of Panama, through the Canal Zone, to the city of Colon, in the Republic of Panama, for the deaths of the plaintiffs' decedents alleged to be caused by the negligence of the defendant on May 20, 1918, near Gamboa, in the Canal Zone, and in what is known as the Gamboa wreck.

In the Castilla case, No. 292, it is alleged in the complaint that the plaintiff is feme sole, of lawful age, a resident of the city of Panama, Republic of Panama, and that on the 20th day of May, 1919, she was the mother of one Lorenzo Ferrero, Jr., a minor male child, six years of age, the natural son of plaintiff by her common law husband, Lorenzo Ferrero, Sr., deceased, the said child being the only son of plaintiff and plaintiff the only surviving heir at law of the said Lorenzo Ferrero, Jr., and the defendant is a corporation and doing business under the laws of the State of New York, United States of America, is a common carrier within the Panama Canal Zone, and was such common carrier and was operating said railroad on the 20th day of May, 1918; that on said 20th day of May, 1918, plaintiff purchased from the defendant at defendant's railroad station in the city of Panama, Republic of Panama, a certain railroad ticket by the terms of which the defendant company promised and agreed with the plaintiff in consideration of the payment unto the defendant of the purchase price of said ticket, to safely carry said plaintiff's minor son, Lorenzo Ferrero, Jr., as a passenger in a second-class coach of one of the defendant's regular passenger trains, from the city of Panama, through and across the Canal Zone, to the city or town of Gatun, Canal Zone; and that said minor son, under the care and custody of a nurse, became a passenger in said defendant's railroad train, * * etc., and that while plaintiff's said minor son was such

passenger on such coach or car of said train,
6 the defendant company and its servants and employees, so negligently and unskillfully conducted itself and themselves in the operation and management of said train of cars, and in having its tracks so unskillfully constructed and in using improper equipment, as to cause derailment of said train upon which said plaintiff's minor son was riding as a passenger, at or near a place known as Gamboa, within the Canal Zone, and as a result of said negligence and derailment of defendant's train the coach or car wherein plaintiff's said minor son was riding as a passenger was suddenly and violently thrown from the tracks while said train was being operated at a great and dangerous rate of speed upon a down grade and at a curve; and by being so thrown from the tracks the said car was overturned, broken up and wrecked, and the said Lorenzo Ferrero, Jr., minor son of the plaintiff, was then and thereupon immediately killed.

And plaintiff further alleged that she was damaged by reason of her son's death in the sum of Twenty-five thousand dollars ($25,000.00), and prayed judgment.

To this complaint the defendant demurred on the grounds: first, because the cause of action, if any existed, did not survive in favor of the plaintiff herein, the deceased being the illegitimate child of the plaintiff; second, because the plaintiff herein would not have been entitled to the earnings of the deceased minor during his minority, under the laws of the Canal Zone; and third, because the plaintiff would not have been entitled to any of the earnings of the said minor after he attained his majority, under the laws of the Canal Zone.

In the case of James Rock vs. the Panama Railroad Company, No. 310, the plaintiff alleges in his complaint that he is a resident of Gatun, Canal Zone, and is the

only surviving heir at law of Rachel Rock, plaintiff's deceased wife, and plaintiff brings this action for himself and in his capacity as heir of the said Rachel Rock, deceased, and that the defendant is a corporation, organized and existing under and by virtue of the laws of the State of New York, United States of America, is a common carrier by railroad within the Canal Zone, and at all times hereinafter mentioned defendant was such common carrier of persons and property for hire, and was such common carrier and was operating said railroad on the 20th day of May, 1918.

Plaintiff further alleges that on the 20th day of May, 1918, and a long time prior thereto, he was the lawful husband of Rachel Rock, deceased, and living with his said wife in the town of Gatun, and that he is the legal heir and her only surviving heir at law.

That on the 20th day of May, 1918, said Rachel Rock, for the usual customary cash consideration which was then and there paid by the said plaintiff's decedent unto the defendant, she purchased from the defendant a certain railroad ticket, by the terms of which defendant promised and agreed to undertake to safely carry plaintiff's decedent as passenger in a second-class coach or car of one of the defendant's passenger trains, from the city of Panama, Republic of Panama, through and across the Canal Zone to the town of Gatun, Canal Zone, * * etc., and that plaintiff's said decedent did then and there go aboard and enter said second-class coach or car of said defendant's train and became a passenger thereon, etc.

That while plaintiff's decedent was such passenger the defendant and its servants and employees so negligently conducted itself and themselves in the operation and management of said train of cars, and in having its track so unskillfully and improperly constructed, etc.,

as to cause the derailment of said train of cars
7 at or near a place known as Gamboa, in the Canal Zone, and that the coach or car wherein said plaintiff's decedent was riding as a passenger, was suddenly and violently thrown from the tracks while said train was being operated by the defendant at a great and dangerous rate of speed upon a down grade and at a curve, and that said car was overthrown and whereby said Rachael Rock, plaintiff's decedent, received great and severe bodily injuries from which she suffered great and severe bodily, physical pain and mental anguish, and from which said injuries, received as aforesaid, died on the 20th day of May, 1918, etc., and

That plaintiff suffered damages in the sum of Fifteen Thousand Dollars ($15,000.00), for which he prays judgment.

To this complaint the defendant filed a demurrer on the ground that under the substantive law of the Canal Zone there is no statute or law which confers an action for damages for wrongful death, nor does any statute or law specify the party who would be authorized to sue and recover therefor.

The demurrer to each of these complaints raises the question of the right of the plaintiffs to recover under any laws of the Canal Zone. The parties agreed that the demurrers to both these cases should be argued together at the same time, and that the Court's ruling on the demurrers, which the Court announced would be in writing, shall be made at the same time and filed in each case.

Oral argument was held and briefs filed by counsel for both plaintiffs and defendant.

Plaintiff concedes that these are not actions based upon the theory of the survival of action of a deceased person, and that plaintiffs are not bringing suits for any sufferings or injuries to the deceased persons, Rachel

Rock and Lorenzo Ferrero, Jr., and plaintiffs further admit that any right of action that Rachael Rock or Lorenzo Ferrero, Jr., had against the Panama Railroad Company for their sufferings, mental anguish or mutilation caused by the negligence of said Railroad Company, dies with them; but plaintiffs contend that under the laws of the Canal Zone, that when the defendant company by its negligence deprived James Rock, one of the Plaintiffs, of his wife, he, James Rock, was materially damaged by the Panama Railroad Company, and a new right of action arose in favor of him,—not to sue on account of any action which his deceased wife had against the Company for her injury and damage, but to sue for his direct damage in being deprived by the said Company through the Company's negligence, of the services and companionship of his wife; and plaintiffs further contend that when the said Company through its negligence deprived Camila Castilla of her son, a right of action arose against the Company in favor of her,—not on account of sufferings and injuries of her deceased son, but on account of her direct loss of being deprived of the companionship, right of services, and expectancy of support of her, of which she had been wrongfully deprived by the said Company.

Counsel for plaintiffs concedes that if plaintiffs have any right of action at all, it must be by virtue of Section 2341 of the Civil Code of the Canal Zone, which reads as follows:

"He who has been guilty of an offense or fault which has caused another damage, is obliged to repair it."

Some of the questions raised by the demurrer in this case are res nova in this Court as now

constituted. Congress has not yet seen fit to give to the Canal Zone a complete and efficient code of laws, and this Court is constantly confronted with indefinite, uncertain, ancient, and incomplete laws to construe. For more than one hundred years the territory of which the Canal Zone strip forms a part has been governed by the Napoleonic code. The Civil Code now in effect in the Canal Zone was enacted by the Congress of Columbia in 1873, and was made applicable to the Republic of Panama in 1887. By act of Congress, approved April 28, 1904, the President of the United States was granted power, until the expiration of the 58th Congress, to make all rules and regulations necessary for the government of the Canal Zone. Under the authority thus given him, on April 28, 1904, the President addressed a letter to the Secretary of War, by the terms of which the directions of the Canal affairs was placed under the control of that official,
8 and in said letter the president directed as follows:

"The laws of the land, with which the inhabitants are familiar, and which were in force on February 26, 1904, will continue in force in the Canal Zone, and in other places on the Isthmus over which the United States has jurisdiction, until altered or annulled by the said Commission, but there are certain great principles of government which have been made the basis of our existence as a nation which we deem essential to the rule of law and the maintenance of order, and which shall have force in said Zone."

At this time the Canal Zone was inhabited by Panamanians who were familiar with the Napoleonic code adopted by Columbia and Panama. But in 1912 the President declared all the land within the limits of the Canal Zone to be necessary for the construction, etc., of the Panama Canal, and took possession of all the land,

and the Panamanians were required to remove from the Canal Zone, and from that time to the present the Canal Zone has been inhabited and peopled largely by people who came from the United States, and who were and are unacquainted with the Code as adopted by Colombia, and extended to Panama, and thereafter retained on the Canal Zone as heretofore stated, and this Court is required to interpret these ancient laws and apply them to a people who are unacquainted with them, and who have been educated to a more modern system of laws as prevails in the States.

We are not without some assistance as to the manner of construing the uncertain, indefinite and incomplete laws of the Canal Zone. The Supreme Court of the United States has in a measure marked the manner of the construction of such laws in the case of the Panama Railroad Company v. Theo. Bosse, decided March 3, 1919. This was an action commenced in the United States District Court of the Canal Zone for personal injuries and consequent suffering caused by the Railroad Company's chauffeur negligently driving a motor omnibus in such a manner as to injure the defendant. The Railroad Company demurred to the complaint, and one of the specifications of the demurrer raised the right of the plaintiff to recover damages for pain and suffering. This involved the construction of the said Section 2341: "He who shall have been guilty of an offense or fault, which has caused another damage, is obliged to repair it without prejudice to the principal penalty which the law imposes." In this decision the Supreme Court reviews the laws in general of the Canal Zone, as follows: "By the act of Congress of April 28, 1904, c. 1758; Section 2; 33 Stat. 429; temporary powers of government of the Canal Zone were vested in such persons and were to be exercised in such manner as the

President should direct. An Executive Order of the President, addressed to the Secretary of War on March 8, 1904, directed that the power of the Isthmian Commission should be exercised under the Secretary's direction. The order contains this passage: 'The laws of the land with which the inhabitants are familiar, and which were in force on February 26, 1904, will continue in force in the Canal Zone, * * * until altered or annulled by the said Commission.' With power to the Commission to legislate, subject to approval by the Secretary." This was construed to keep in force the Civil Code of the Republic of Panama, which was translated into English and published by the Isthmian Canal Commission in 1905. By the act of Congress of Aug. 24, 1912, c. 390, Section 2; 378 Stat. 560, 561: "All laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the Government and sanitation of the Canal Zone, the construction of the Panama Canal, are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide."

On December 5, 1912, acting under authority of the before mentioned act of August 24, 1912, section 3, the President declared all the land within the limits of the Canal Zone to be necessary for the construction, etc., of the Panama Canal, and directed the Chairman of the Isthmian Commission to take possession of it with provision for the extinguishment of all adverse claims and titles." The Canal Zone is now peopled only by the employees of the Canal, the Panama Railroad, steamship lines and oil companies who are permitted to do business in the Zone under license. The Supreme Court says further: "If it be true that the Civil Code would have been construed to exclude the defendant's liability in the present case, if the Zone had remained within the juris-

diction of Colombia, it does not follow that the liability is no greater as things stand now. The President's order continuing the law then in force was merely the embodiment of the rule that a change of sovereignty does not put an end to existing private law, and the revocation of that order by the act of August 24, 1912, no more vested upon the Zone a specific interpretation of the former Civil Code than does the statute adopting the common law vest upon a territory a specific doctrine of the English Courts. * * *

In the matter of the personal relations and duties of the kind now before us, the supposed interpretation would not be a law with which the present inhabitants are familiar in the language of the President's order, but on the contrary an exotic imposition of a rule opposed to the common understanding of men."

The Supreme Court then proceeds to show that even the Supreme Court of the Canal Zone, which has since been abolished, announced that it would look to the common law in the construction of the Colombian statutes. Again the Court says, "It is not necessary to dwell upon the drift toward the common law doctrine noticeable in some Civil law jurisdiction at least, but to consider how far we should go if the language of the Civil Code were clearer than it is. It is enough that the language is not necessarily inconsistent with the common law ruling."

In the opinion the Court said: "We are satisfied that it would be a sacrifice of substance to form if we should reverse this, the principle of which has been accepted by all judges accustomed to deal with the locality in deference to the possibility that a different

interpretation might have been reached had the Civil Code continued to regulate a native population and to be construed by native Courts.

In closing the opinion, the Supreme Court said: "The physical pain being substantially an appreciable part of the wrong done, allowed for in the customary compensation which the people of the Zone have been awarded in their native Courts, is properly allowed here," and affirmed the judgment of the United States District Court. It would seem from this devision the Supreme Court is of an opinion that an exotic Interpretation of the Civil Code of the Canal Zone would be an imposition of rule opposed to the common understanding of men.

Section 2341 of the Civil Code of the Canal Zone is almost in the exact language of the French law, or Code of Napoleon, from which the Civil Code of the Canal Zone is taken. The words of the Civil Code of Cuba, also based upon the same basic law, are as follows:

"He who, through act or omission, causes damage to another, through intervening fault or negligence, is obliged to repair the damage caused."

Civil Code of Cuba, Article 1902.

And the Supreme Court of Cuba, a Court composed of Spanish speaking lawyers, working in Spanish and under the principles of Spanish law, construed the statute as above set out in a case brought to ascertain if a widow had a right of action against a company for the negligent killing of her husband by that Company, and under that statute the Court allowed her to recover for her, and not her husband's injuries, the Court saying:

"A sentence, which, recognizing as the cause of death of an individual, the negligence of an employee of an en-

terprise or company, condemns that enterprise or company to the payment of damages is in perfect accord with the precepts of Articles 1902 and 1903 of the Civil Code."—Theofila Bonsa, widow of Formoso, vs. Francisco Unilo Terry, Sentence No. 63 of November 11, 1903; Sup. Ct. of Rep. of Cuba.

In the laws of the Republic of Panama there is a statute almost verbatim with Article 2341 of the Canal Zone, and under that statute in 1918, a suit was brought in the Courts of Panama City against the street car company by a woman, Emilia Orozzo, for the negligent killing of her son, Eliseo Masa, and the Supreme Court of Panama allowed her to recover against the Company on the theory that she had been materially damaged by the killing of her son. In other words, the Court held that under the statute (which is practically Section 2341 of the Canal Zone), the street car company had been guilty of an offense or fault which had caused damage to this mother, and therefore obliged to make restitution to the mother for the damage done to her by the street car company's neglect.

It must be seen that in Cuba and Panama,—the very countries who formulated and gave to us the Civil Code, Article 2341 is interpreted to mean just what it says, and any act of man that causes damage to another creates and imposes liability and obligation that the trespasser must answer in damages with whomsoever may have been injured by the negligent act.

Prior to the time that the Supreme Court of the Canal Zone was abolished, that Court speaking through Justice Collins, in the case of Chong vs. Chong, (2 C. Z. Sup. Ct. Report, 2532), said:

"No greater system of substantive law has been prepared by man than the Spanish Code; but it must always

be carried in mind by reason of its universality it must at times lack in specificity, and that into its universality must be breathed the spirit of liberal construction."

It was upon the doctrine of this case that the Supreme Court mainly based its decision in Fitzpatrick vs. Panama Railroad Company (2 C. Z. Supt. Ct. Rep. 111), and that case has been decided with approval by the Supreme Court of the United States in the case of the Panama Railroad Company, plaintiff in error, vs. Theo. Bosse, decided March 3, 1919.

The Civil Code of Porto Rico, Article 1902, provides: "A person who by an act of omission causes damage to another when there is fault or negligence, shall be obliged to repair the damage so done."

In the United States District Court for the District of Porto Rico, an action was brought by Teresa Borrero vs. Compania Anonyma de la Luz Electrica de Ponce, for damages for the death of her son, under said Section 1902, of the Civil Code of Porto Rico. Hon. Wm. H. Holt, who was United States District Judge for Porto Rico on January 14, 1903, when said case was decided by the Court, delivered an opinion, being rather brief but very comprehensive, I thought it advisable to set out this opinion in full, which is as follows:

"This is an action by the plaintiff, Teresa Borrero, who is a widow for damages for the death of her son, who was not in the employ of the defendant company, through its alleged negligence. It is averred that the defendant was in control of the electric wires in the streets of Ponce, used for lighting the city; that it negligently permitted a wire to hang loose, the end of it nearly touching the sidewalk, and that her son com-

ing in contact with it, was killed almost instantly. The case is submitted upon a general demurrer to the declaration. The question is presented whether, under the existing law in Porto Rico, an action can be maintained for the death of a person through negligence. The declaration does not aver the age of the deceased; but under the law of Porto Rico children are bound
11 to support the parents without regard to their age.

By the common law, no civil action lies for an injury which results in death. Actio personalis moritur cum persona. Whatever dispute may have once existed over it, this is to be regarded as the rule definitely settled by the Supreme Court of the United States. Mobile L. Inc. Co. vs. Brame, 95 U. S. 756, 24 L. Ed. 582.

The rule was again stated in the case of The Harrisburg (The Harrisburg v. Richards), 119 U. S. 199, 30 L. Ed. 358, 7 Sup. Ct. Rep. 140, and in which it was held that no such action lies in a United States Court under the general maritime law. Where the common law prevails, and the right to sue in case of death exists, it is solely by virtue of statute. In England the act of Parliament of 1846, commonly known as "Lord Campbell's act," first gave the right; and it has served as a model for subsequent legislation on this subject. In most, if not all, of the States of the United States this right has been given by statute. The act, however, creating civil government in Porto Rico of April 12, 1900, provided that the existing laws of Porto Rico should continue in force except as therein altered, and as altered by military orders in force May 1st, 1900, and so far as they were not inconsistent with the statutory laws of the United States locally applicable. The question is, therefore, to be considered with a view to the mixed system of law prevailing here. The ques-

tion is res nova in this Court. The civil law, so far as it existed in Porto Rico, has as above modified, been continued in force.

Writers on international law, especially Grotius, recognized liability in case of death by negligence, to make reparation to those whom the deceased was bound in duty to maintain. Pufendorf and other writers upon natural law maintain the same; and it is said that natural equity and the general principles of law favor such action. Domat, in his work on Civil Law, recognizes this as the true rule. The opinion of the Supreme Court of the United States in the case of The Harrisburg, recites that it is said that by the civil law such action may be maintained but that this is denied by the Supreme Court of Louisiana. There is no question but what under the French law it lies. Whatever the rule may be, however, the law of Porto Rico as derived from Spain must be decisive of the question in this jurisdiction. The local legislature has not provided for the case.

The Civil Code of Porto Rico, Article 1902, provides: 'A person who by an act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage so done.' There is no express provision as to the right to sue in case of death. Under the practice formerly existing in Porto Rico, in a proper case the law provided for, not only criminal proceedings, but for indemnification on account of the unlawful act to those entitled to it, all in the same proceedings; but those entitled to the civil indemnity could decline to proceed with the criminal action, and yet sue for civil liability. Article 16 of the Penal Code provided that one liable for a misdemeanor was also liable civilly. Both the penal and civil liability could be determined in the same proceedings; and Article 123 provided: "The action to demand restitution, reparation, or indemnification is

also transmitted to the heirs of the person injured." The Supreme Court of Spain in the case of Juana Alonzo Celada against Manual Chacon and Caandido Lara, in December, 1894, held that under the then existing Spanish law the action could be maintained. This Court was the supreme tribunal as to the construction of Spanish law and the Civil law so far as existing and applicable to Spanish possessions. Regard should be had, in my opinion, to its authority, and in view of this provision of the law and of this ruling, the
12 demurrer herein is overruled."

On January 16, 1903, in the same Court, in the case of Leocadio Torres, etc., vs. Ponce Railway & Light Company, Porto Rico Federal Reports, Vol. I, pp. 476-477, the Court affirmed the opinion in the Borrero case. In the Torres case the brother and sister sued for damages for injury to their brother, resulting in death, through the alleged negligence of the defendant in the operation of its electric street cars upon a street in the city of Ponce; they alleging deceased dies intestate, leaving no widow or issue; that plaintiffs are his only heirs, and that they were dependent on him for support; and that he always did support them; and that they are now destitute.

A demurrer was filed to the complaint, as there was in the Borrero case, on the ground that plaintiffs had no right to sue or maintain an action, but between the dates in the decision in the Borrero case and the Torres case, there had been adopted an amended Civil Code of Porto Rico, and the defendant urged that if the correct rule was announced in the Borrero case that it was otherwise under the present law, but the Court in rendering his opinion held that Article 1803 of the amended Code was the same as Article 1902

of the original Civil Code, and the Court further stated that there had been no such change of the local law as to render inapplicable the construction given by the Supreme Court of Spain to the existing civil law applicable to Porto Rico, and which law, with certain qualifications unnecessary to enumerate, had been continued in force by the act of Congress of April 12, 1900.

Again, in the United States District Court in and for Porto Rico, the Hon. Bernard S. Rodey, District Judge, a decision was rendered December 3, 1908, in the case of Belen Requena de Molina v. San Juan Light & Transit Company (Porto Rico Federal Reports, Vol. IV, pp. 356-361). This was an action filed under Section 1803 of the Civil Code of Porto Rico of the year 1902, which reads: "A person who, by an act or omission, causes damage to another when there is fault or negligence, shall be obliged to repair the damage so done." The Court said: "This is a plain action for damages, brought by the plaintiff as the widow of her late husband, Francisco Molina, who, she alleges, met his death (on the night of the 1st or the morning of the 2nd of April, 1908), through the negligence of the defendant." The decedent's death was brought about by an electric shock received while he was in a dining room in the city of San Juan, and in this case the Court sustained a verdict for the plaintiff in the sum of $17,500. This case was appealed to the Supreme Court of the United States, and reported in 224 U. S., pp. 680-681, the Supreme Court affirming the decision of the U. S. District Court of Porto Rico.

If the plaintiff herein or either of them, have a right of action, it must rest upon Article 2341 of the Civil Code of Panama, which reads as follows: "He who shall have been guilty of an offense or fault which has caused another damage, is obliged to repair it, without prejudice

to the principal penalty which the law imposes for the fault or offense committed."

Were it not for the fact that the Courts in Spanish countries in construing this statute or statutes almost identical with it, have held that such recoveries as these in question could be had, it would seem to me at first impression doubtful whether this article creates a right of action in heirs or dependents for the wrongful death of a person. It is generally considered that in common law, and particularly under Civil Law, a right
13 of action for the death of a person does not survive.

As was said in the Supreme Court of Louisiana:

"Legislation and jurisprudence have combined to perpetuate the extraordinary doctine that the life of a free man cannot be made the subject of valuation, and under the domination of that dogmatic utterance made earlier than the Roman Digest, reproduced therein, and echoed by the Courts of all countries from then till now, the singular spectacle has been witnessed of Courts sanctioning damages for short lived pains, and refusing them for a life long sorrow and the pecuniary losses consequent upon the death of one from whom was derived support, comfort, and even the necessary stays of life." Van Amburg v. Pittsburg S. & R. R. Company, 37 La. Ann. 650. The same doctrine prevails under the general maritime law where death is the result of negligence. "The Harrisburg," 119 U. S. 199.

Construing Article 2341 of the Civil Code in accordance with the principles of common law, or even of the civil law, it would seem that a right of action is not created by it in either of the plaintiffs. The

common law rule, however, has long been abrogated by statute both in England and America, and it would seem reasonable to recognize that universal change and to interpret Article 2341 not in accordance with the ancient common law doctrine, but rather in the spirit and according to the principles of present day rule, even though that rule be of legislative enactment.

This construction, apparently, had been followed by our neighboring Courts as heretofore set out. In view of these cases, and in accordance with reason, I believe I am justified in holding that recovery may be had under the Code by an heir or legal dependent for a wrongful death.

Therefore, I overrule the demurrer as to this point.

There is another question involved which is worth while considering on the question of the right to recover in this case, that is the rule when the injury consists of a breach of contract. In the cases at bar, contracts were entered into between the decedent in the Rock case and the defendant and the mother of decedent of the Castillo case and the defendant to transport the deceased to certain points safely. It has been held that torts that spring from contracts that consist in mere omission of a contract duty are strongly distinguished from wrongs which are merely trespasses upon the rights of the master of the person in the servants. It has been held that where passengers purchase and secure tickets to make journeys on railways, and during such journey receive injuries from the negligence of the Railroad Company, that the action in substance is on the contract and the damage resulting by reason of the breach of contract, and whatever damage is sustained are the natural result of the breach of contract. For decisions along this line see Gulf, Colorado & Santa Fe R. R. Co. v. W. T. Beal and

wife, reported in 41 L. R. A., page 807, and note 4 on page 815.

Another specification in the demurrer in the Castillo case raises the question that the plaintiff is not entitled to the earnings of the deceased minor during his minority under the laws of the Canal Zone, and that plaintiff would not be entitled to any of the earnings of the minor after he attained his majority under the laws of the Canal Zone, and for these reasons the plaintiff cannot recover.

14

We will first look to the laws of the Canal Zone and see whether or not these specifications of the demurrer are well taken. Section 411 of the Civil Code, at page 102, provides that "support is due:

1. Spouses.

2. Legitimate decendents.

3. Legitimate ascendants.

4. A woman divorced who did not give cause therefor.

5. The natural children, and their legitimate posterity.

6. The natural parents.

Article 77 of law 153 of 1887, which is a supplement and amendment to the Civil Code, and which may be found at page 564 of the Code reads as follows: "An illegitimate father suing for support in such capacity shall not be heard. But a mother who demands support of an illegitimate child shall be heard." Under the common law parents were always entitled to the custody

and services of the child until they should have reached their majority. See Cooley on Torts, 2 Ed. p. 39.

Southerland on Damages, states as follows: "In the case of the death of a minor child the pecuniary benefit its parents had a reasonable expectation of receiving from him had he lived, is the measure of damages; and in addition thereto, the cost of medical aid and other like expenses necessarily incurred were held recoverable, but those were not items of pecuniary injury resulting from the death." 4 Southerland on Damages, p. 3736, and citing authorities. Again that authority at page 3738 said: "The principal limit of damage to a parent as the result of the death of a child is the loss of its services during minority, considering the cost of support and maintenance during the helpless part of its life.

It has also been held in a number of States that "A parent seeking to recover damages for the negligent killing of his child is not limited to the present loss of money, but may be allowed prospective advantages of a pecuniary nature." See Vicksburg v. McLain, 67 Miss. 4; Penna. R. R. Co. v. Keller, 67 Pa. 304; Tilly v. Hudson R. Co., 24 N. Y. 473.

Again in the Supreme Court of Indiana, in the case of Mayhew v. Burns, 1 West. Rep. 577; 103 Ind. 328, set the rule that "The reasonable expectation of pecuniary advantage by the relation of parent and child continuing may be taken into account." This is supported by the Supreme Court of Pennsylvania, in Penna R. R. Co. v. Adams, 55 Pa. 499; and many other cases.

In the case of State v. B. & O. R. Co., 24 Md. 107, it was held, "A father may recover for loss of services of a minor child up to the termination of his minority."

In the case of Chicago & A. R. Co. v. Becker, 84 Ill., the parents were allowed to recover the sum of two

thousand dollars for the death of a six year old minor child; and in Houghkirk v. D. & H. Canal Co., 26 Hun. 407, a recovery of five thousand dollars was allowed to stand by the Supreme Court for the death of a six year old child.

The additional question is raised in the Castilla case as to the mother having a right to recover for the death of her child on the ground, as stated in the demurrer, that the child is an illegitimate one; but the complaint in this case alleges the child to be a natural son of plaintiff by her common law husband, Lorenzo Ferrero, Sr., deceased; the said child being the only son of plaintiff, and plaintiff is now the only surviving heir at law of the said Lorenzo Ferrero, Jr., and of course, the demurrer admits the truth of the allegations in the complaint, and I must rule as to the sufficiency of the complaint on the demurrer.

However, in the argument it was contended by the defense that this was an illegitimate child; that the father and mother were never married; but both parties admit that the father and mother lived together as husband and wife until the death of the father. I might add here that a very large per cent of men and women in Panama live together as husband and wife without a ceremony of marriage, and raise families of children, and the practice is so prevalent and so extensive that a large per cent of the people in Panama look upon this manner of living together as husband and wife as legal and proper. But assuming that common law marriages are not legal in Panama and that the deceased child was born to the plaintiff and the man with whom she lived when there was no formality of marriage ceremony, will that defeat her recovery in this case?

Under the title of Additions to an Amendment of the Civil Code, at page 545, of the Civil Code, we find Article 7 which reads as follows: "The natural children are called those begotten out of wedlock, and of persons who could marry each other at the time of the conception; those children who have been acknowledged by their father or mother, or by both, in a public instrument or testimentary act, or in accordance with Article 368 of the Code."

Notwithstanding the provision of the preceding paragraphs natural children shall be considered as to the mother, and for all civil effects, those conceived by a woman who could freely marry at the time of the conception."

Article 368 referred to in said Article 7, are in the following words: "When a father shall acknowledge a natural child in the record of birth, it shall be sufficient that he shall sign the respective record as evidence of acknowledgment."

Article 77 of the amended Code, found on page 564, are in these words: "An illegitimate father suing for support in such capacity shall not be heard. But a mother who demands support of the illegitimate child, shall be heard, unless the latter shall have been abandoned by her in infancy." The theory of our decisions is that the right to recover damages for the death of a human being is purely statutory, and the statute giving such right must be strictly construed, and it is a rule of construction that prima facie, the word 'child' and 'children' used either in statute of law, means legitimate child or children." Alice McDonalds v. So. R. R., 757 S. C. 352; 2 L. R. A., N. S. 640 and Note).

It is usually held therefore, that no action can be maintained for the death of an illegitimate child under

the statute. (Ala. & V. R. Co. v. Wilgins (Miss.), 51 L. R. A. 826; 28 So. 853.

So the right of a mother to recover for the negligent killing of an illegitimate child under the statute giving a right of action for the negligent killing of a child is denied in Georgia, notwithstanding the fact that the statutes of the State provide that illegitimate children may inherit from the mother, and their mother from them in the same manner as if legitimate. (Robinson v. R. & B. Co., 117 Ga. 168; 60 L. R. A. 555; 43 S. E. 452.)

In Indiana it has been held that the father of an illegitimate child has no right of action for the child's death under a statute giving the father the right of action for the death of a child although the mother is dead, and the child has been acknowledged by the father, and had no guardian or next of kin except him.
16 (McDonald v. P. C. C. & St. L. R. R. Co., 144 Ind. 459; 32 L. R. A. 309; 43 N. E. 447.)

Applying the same rule to actions for the benefit of an illegitimate child, the right to maintain an action under Lord Campbell's act for the death of a woman for the benefit of her illegitimate child was denied in an English case on the ground that the word "child" in an act of Parliament always applies exclusively to a legitimate child. So the right of an illegitimate child to recover under a statute giving a right of action to one dependent upon a person whose death was caused by intoxicating liquor illegally furnished, is denied in Good v. Towns, 56 Vt. 410. And it has been held that an illegitimate half-sister cannot maintain an action under a statute entitling a sister or brother to sue for the death of a sister or brother. Ill. C. R. Company v. Johnson (Miss.); 51 L. R. A. 837; 28 S. 753.

It must be noted, however, that these decisions are not so much based upon any principle of law as they are

upon a construction of the meaning of the word 'child' as used in the statute creating the right of action. As was said by Chandler, Judge of the Supreme Court of Georgia, in concurring opinion: "I concur in the judgment rendered in this case because under the previous rulings of this Court it must be binding upon us. If it were an original question, I would never agree to a judgment which holds that for the death of a child, the doubly unfortunate mother of a child, whose sole parent she is and upon whom she is dependent,—this dependency probably due to the fact of its miserable birth,—cannot recover for its homicide, although our law makers have declared that 'a mother can recover for the homicide of a child upon whom she is dependent or who contributes toward her support."

Where by statute the mother and child are permitted to inherit from each other, a right of dependence is given to the one against the other, and it would seem the right of recovery for death would continue as a natural consequence. It was stated, however, by the Supreme Court of Georgia in this connection "while it is evidently true that the status of illegitimates under our law is greatly superior to what it was under the common law, yet it cannot be said that they have been legitimatized, at least for all purposes, and placed upon the same footing in all respects as children born of lawful wedlock; and in view of the decision of this Court to the Statute giving the right of action for homicide should be strictly constructed; the word 'child' used in the statue, prima facia means a legitimate child, we are constrained to hold that the mother of an illegitimate child has no right of action for his wrongful or negligent homicide."

It may be noted that there are some decisions which hold that where the mother and child are permitted by statute to inherit from each other, recovery may be had by the mother for the wrongful death of her child.

Two of the cases, however, referred to in support of this more liberal construction, are the Security Title Co. v. Chicago St. Ry. Co., 91 Ill. Apel. 332; and Mash v. Wood Co., 122 Mo. 225; 25 S. W. 179.

In the Missouri case it seems to have been held that since by statute, an illegitimate child was made capable of inheriting from its mother and the mother from the child, there could be no good reason why a mother should not be permitted to recover for the negligent killing of her illegitimate child under the statute permitting the father or mother to recover for the negligent killing of a child.

It might be answered that the reason for a contrary ruling, as pointed out by the other decisions, is that the word 'child' when used in a statute is universally construed to mean a legitimate child. Upon this principle of construction is based the settled rule that under the statutes in the various States and of England, a mother cannot recover for the death of an illegitimate child, though under the general statutes of inheritance,
17 she may inherit from the child and the child from her.

The American rulings, however, are not conclusive in the case pending before me. The plaintiff herein is not proceeding under a statute corresponding to "Lord Campbell's act," and the construction of the term "child" as used in such statutes need not determine my decision as it determined the decisions in the cases cited. Article 1239 and 1240 of the Civil Code of the Canal Zone, designated natural parents as legal heirs; Article 411 of the Code states that support is due to natural parents,

and the Civil Code further provides that the mother may demand support from the illegitimate child. (Article 77, page 564). If under Article 2341, a right of action for injury causing death survives, the decisions I have stated would not necessarily preclude me from holding such right of action survives for the benefit of the heirs and those legally entitled to support. The general force of American decisions is merely to hold that where the word 'child' is used in a statute, a legitimate child is meant, and that, broadly speaking, the rights and privileges that are given by law to parents and children ordinarily do not extend to illegitimate children or natural parents. But as to who has the right to maintain an action for a minor child, if one can be maintained, the general trend of authorities is that while either the father or mother is alive, unless they have relinquished their right, respectively, to the services of the child, by emancipation or otherwise, and abdicated their duty to furnish it support, no one else is entitled to maintain an action for loss of its services during minority, because the injury is to the person entitled to the child's services and not to the minor's estate.

I think a more liberal rule is now being established in the States in favor of a mother recovering for the death of her illegitimate child. In the case of Thompson v. D. L. & W. Ry. Co. (1910), 41 Pa. Super. Ct. 617, it is held that the mother of an illegitimate child is entitled to recover for the wrongful death where by statute the child was legitimate as to her. In the case of L. T. Dickason Coal Co. v. Liddill, (1911), 49 Ind. Apel. 40); 94 N. E. 411, it was held that under a statute authorizing a recovery for the next of kin a recovery for the negligent killing of an illegitimate may be had for the benefit of the mother and brothers and sisters of the

half blood, where, by the statute of distribution, they are next of kin. In the case of Andrezeyejewski v. N. W. Fuel Co. (1914), 158 Wis. 170, 148 N. W. 37, it is held that, under a statute authorizing recovery for the benefit of the lineal ancestors where there are no lineal descendants of the deceased, a mother is entitled to recovery for the pecuniary loss suffered by the killing of an illegitimate son thirty-eight years old who left surviving him no wife or lineal descendants. In the case of the Security Title and T. Co. v. W. Chicago St. R. Co., (1900), 91 Ill. App. 332, it is held that a mother of an illegitimate child is beneficiary in an act for the negligent killing of the child under statute providing that the estate of an illegitimate person shall descend to the widow or the surviving husband and children, the same as the estate of other persons. In a large number of States it has been held that under Statutes embodying in principle "Lord Campbell's act," giving right of recovery for the benefit of the next of kin, or heirs or parents of persons negligently killed, a mother may recover for the negligent killing of an illegitimate child.—Hadly v. Tallahassee (1914), 67 Fla. 436; 65 So. 545; Southern R. Co. v. Hawkins, (1910), 35 App. D. C. 133; 21 Ann. Cas. 928. Security Title & T. Co. v. W. Chicago Street R. Co. (1900), 91 Ill. App. 332. L. T. Dickason Coal Co. v. Liddill, (1911), 49 Ind. App. 40; 94 N. E. 411. Marshall v. Wabash R. Co. (1894), 120 Mo. 275; 25 S. W. 179. Muhl. v. Mich. So. R. Co., (1859), 10 Ohio St. 272. Croft v. Southern Cotton Oil Co., (1909), 83 S. C. 232; 65 S. E. 216. Galveston H. & S. A. R. Co. v. Walker (1902), 48 Tex. Civ. App. 52; 106 S. W. 705. See also note in 2 L. R. A. (N. S.), 640. L. T. Dickason Coal Co. v. Liddill, (1911), L. R. A. 1916E, 49 Ind. App. 40; 94 N. E. 411, and a number of other States which are in accord with these decisions; however, as herebefore stated, there is a

conflict of decisions on this point. The Indiana case cited is based on a section of the Code which provides that "a father (or, in case of his death, or desertion of his family, or imprisonment, the mother) may maintain an action for the injury or death of a child." Under this section, it is held that the mother of an illegitimate child could maintain such an action, regardless of whether the father is living or not.

18 In the absence of some enactment corresponding to "Lord Campbell's act," the cause of action in both of these cases would have to be based on Article 2341 of the Civil Code. Guided by the Supreme Court of the United States in the case of the Panama Railroad Company v. Theo. Bosey, decided March 3, 1919, I think I am justified in interpreting this article in accordance with the universal statutory laws of England and the United States, and hold that the cause of action survives; unrestricted by the limited meaning of the word 'child' as used in the statute creating a right of action, I see no reason why I should not hold that the cause of action survives for the benefit of the legal heirs and those entitled under the Civil Code of the Canal Zone to legal support.

The question with me is an original one, and I believe I am justified in taking a position assumed in his concurring opinion by Chandler, Judge, in the Georgia case cited: "If it were an original question I would never agree to the judgment which holds that for the death of a child, the unfortunate mother of the child, whose sole parent she is and upon whom she is dependent, cannot recover for its homicide, although our law makers have declared that a mother may recover for the homicide of a child upon whom she is dependent or who contributes toward her support."

Assuming that under the Civil Code of the Canal Zone a mother may recover for the death of a child, I believe I am justified in holding that a natural mother may recover for the death of her illegitimate child whose heir she is and from whom under the provisions of the Civil Code she is entitled to support, and

Therefore overrule the demurrer on this point.

JOHN W. HANAN,
U. S. District Judge.

Filed October 22, 1919, in the office of the Clerk of the District Court, Canal Zone.

E. M. GOOLSBY, Clerk.

AMENDED ANSWER.

United States of America, Canal Zone.

In the United States District Court for the Canal Zone, Division of Balboa.

James Rock, Plaintiff,

vs. Civil No. 310.

Panama Railroad Company, a Corporation, Defendant.

Amended Answer.

Now comes the Panama Railroad Company, defendant in the above styled and numbered cause, by its attorneys, Frank Feuille and Walter F. Van Dame, and without

in any manner waiving its pleas, exceptions, and demurrer herein filed, and not waiving any objection or exception heretofore raised and saved to the Honorable Court's refusal to enter a rule on plaintiff to file security for defendant company's cost; to deposit a docket fee in the sum of ten dollars ($10.00) with the Clerk of the Court, and to deposit a jury fee in the sum of ten dollars ($10.00) with the Clerk of the Court, which rule was prayed for by defendant company in accordance with the several provisions of the Executive Order of January 9, 1920, denies each and every allegation, generally and specially contained in plaintiff's complaint.

Wherefore, the defendant prays judgment in its favor against the plaintiff, and for its costs and for such other and further relief as to the Court may seem just and equitable.

PANAMA RAILROAD COMPANY,
A Corporation, Defendant.

19 By FRANK FEUILLE,
WALTER F. VAN DAME,
Its Attorneys.

Filed May 6, 1920 in the Office of the Clerk of the District Court, Canal Zone.

E. M. GOOLSBY, Clerk,
F. H. SHEIBLEY, Acting Clerk.

MINUTES—JOINING OF ISSUE.

James Rock, Plaintiff,
vs. Civil No. 310. Damages.
Panama Railroad Company, a Corporation, Defendant.

Minutes.

May 13, 1920:

This day the parties to this action are in open Court in person and by their respective attorneys and thereupon comes said plaintiff and tenders in Court for payment to the Clerk of said Court under protest a jury fee of $10.00. Said tender is accepted and payment is made as aforesaid in open Court. And it appearing to the Court thereafter on the statement of plaintiff, that all costs of said plaintiff herein have been paid, it is ordered by the Court that the motion of said defendant heretofore filed herein for rule on plaintiff to file docket fee and security for costs be and it is hereby overruled, to which ruling of the Court, defendant excepts. And thereupon the issues herein being joined and the parties announcing ready it is ordered that a jury come, whereupon come the jurors of a jury of good and lawful men, to-wit: H. J. White, G. H. Davis, H. F. Hodges, Chas. P. Conlan, L. M. Reed, W. A. Morgan, Frederick W. Zane, C. F. Johnson, J. F. Bashner, J. B. Yaeger, A. J. Scott, and B. A. Armstrong, are duly elected, tried and sworn well and truly to try the issues joined herein and a true verdict render according to the law and the evidence. Whereupon said plaintiff submits proof in support of the allegations of the complaint herein and at the close of plaintiff's case the defendant moves for a directed verdict, which motion is overruled by the Court, to which ruling defendant excepts. And thereafter the defendant

submits its proof herein, and the hour for adjournment having arrived the Court is adjourned to the hour of 9:00 A. M. on the 14th day of May, 1920, and the jury are permitted to separate until said hour.

MINUTES—VERDICT.

James Rock, Plaintiff,
vs. Civil No. 310. Damages.
Panama Railroad Company, a Corporation, Defendant.

Minutes.

May 14, 1920:

This day again come the parties hereto in person and by counsel, and also the jury heretofore impaneled and sworn in this case, and said jury sit together for the hearing of further testimony herein. And thereupon the said defendant offers the testimony of witnesses H. F. Gannon, George Armiger, C. R. Packard, W. T. London, and M. B. Banninger, and at the close of said defendant's case the defendant files its motion for a directed verdict, which motion is opposed by plaintiff. The Court overrules said motion, to which ruling defendant excepts. And the jury, after hearing all testimony adduced, the arguments of counsel and the charge of the Court, retire from the bar thereof in charge of an officer of the Court, to consider of their verdict, and after being absent for a time, return into Court and say: "We, the jury, find for the plaintiff, and fix his damages at ($3,000.00) Dollars.—H. P. White, Foreman.", to which verdict said defendant excepts and gives notice of motion for a new trial herein, and on motion of defendant the Court grants ten days time within which to file said motion.

MINUTES—JUDGMENT.

James Rock, Plaintiff,

vs. Civil No. 310.—Damages.

Panama Railroad Company, a Corporation, Defendant.

Minutes.

June 22, 1920:

The parties hereto are this day present in Court by counsel, and the motion for a new trial filed herein by said defendant being this day called, the Court, after considering the said motion and being fully advised in the premises, overrules the same and the defendant's exception is noted to the said ruling of the Court; and thereupon it is ordered and adjudged by the Court that said plaintiff, James Rock, do have and recover of and from the Panama Railroad Company, a Corporation, defendant herein, the sum of Three Thousand Dollars ($3,000.00), his damages in form as heretofore herein by the jury assessed, with interest thereon at the rate of six per centum per annum, together with his lawful costs and charges in this behalf expended. To this judgment of the Court the said defendant excepts and gives notice of its intention to sue out its writ of error, and is, on motion, given thirty days within which to file its bill of exceptions. The plaintiff objects to the granting of thirty days time for the filing of said bill of exceptions on the ground that it is contrary to the provisions of Sec. 136 of the Code of Civil Procedure of the Canal Zone.

21 DEFENDANT'S BILL OF EXCEPTIONS.

United States of America, Canal Zone.

In the United States District Court for the Canal Zone, Division of Balboa.

James Rock, Plaintiff,
vs. Civil No. 310.
Panama Railroad Company, a Corporation, Defendant.

Be it remembered that on the trial of this cause in this Court at the May Term, A. D. 1920, of the said Court, to-wit: commencing on the thirteenth day of May, the Honorable John W. Hanan, District Judge, presiding, the following proceedings were had:

The Jury was impaneled and sworn, according to law, and thereupon the plaintiff, to sustain the issues upon his behalf, offered the following evidence and the testimony of the following witnesses as his evidence in chief:

The stipulation, which had been entered into by and between counsel for the respective parties prior to the date of the trial, was put in evidence and read to the jury:

"In order to expedite and facilitate the trial of this cause, the following facts are specifically admitted by both parties to be true, and the necessity of proving the same by either party is waived, that is to say:

1. That defendant is a New York corporation and is operating and doing business with the Canal Zone, and is within the jurisdiction of this Court;

2. That two certain cold storage cars and all the second class passenger coaches in a train belonging to and at that time operated by and under the control of defendant company were derailed and wrecked at or near Gamboa, Canal Zone, on date of May 20, 1918, but that neither the engine, the cold storage car attached to engine nor any of the first class coaches in the train were wrecked, damaged, or derailed, nor was the track at the scene of the accident torn up, displaced or broken thereby, but on the contrary was and remained in good and proper condition before as well as after said accident, and up to the present time has not needed repairs of any kind as a result of said accident. The defendant does not admit, but expressly denies that said derailment and wreck were due to any negligence or want of care upon the part of defendant company.

3. That Rachael Rock, the wife of plaintiff, was a passenger in one of the second class coaches mentioned in the foregoing paragraph and that by the derailment and wrecking of certain of said second class passenger coaches in said train she received bodily injuries which caused her death on said 20th day of May, 1918.

This stipulation is signed and entered into by and between Walter F. Van Dame, attorney for the defendant, and William C. MacIntyre, attorney for plaintiff, and shall be filed by plaintiff in lieu of evidence upon the facts stipulated, at the opening of plaintiff's case upon the day of trial."

In order to further sustain the issues in his behalf, CAMILA CASTILLA, first witness for plaintiff was sworn and through an interpreter testified as follows:

22 "My name is Camila Castilla. I knew Rachael Rock, wife of James Rock in her life time. I last saw Mrs. Rock alive on May 20, 1918. I remember the time of the train wreck at Gamboa. My son was killed in the same wreck. I last saw Mrs. Rock at my house. On May 20, 1918, I accompanied her to the Panama Railroad Station in Panama."

Q. Did Mrs. Rock buy a ticket, if you know, for use on the train that night?

Mr. Van Dame, Counsel for defendant:
I object your Honor, that is covered in the stipulation.

The Court:
I overrule the objection. I will not cut out any proof. They will have to make their proof.

Mr. Van Dame:
Exception.

A. "Yes, because I was the one that bought them.

"I know that the ticket was given to the collector at the gate at the station in Panama, because I myself gave him the ticket for the reason that Mrs. Rock had her hands full. She was then allowed to go through the gate and step aboard the train.

Q. How do you know she did?
A. I waited there until the train left.
Q. Was she on the train when it left?

Mr. Van Dame:
I object your Honor. We have admitted that in the stipulation.

The Court:
I know. I have just told you I would let her prove her case.

Mr. Van Dame:
Then we ask for permission to withdraw the stipulation.

The Court:
No, we are going to try the case right this time.

Mr. Van Dame:
Exception to both rulings.

Under Cross Examination the witness testified as follows:

"I am a Nicaraguan. The last time I saw Rachael Rock was when she called at any house and when I went to the railroad station with her on May 20, 1919. At that time I was living in Panama.

GEO. ARMIGER, the second witness called for the plaintiff, after being duly sworn, testified as follows:

"I am a conductor on the Panama Railroad and I was so employed on May 20, 1918; I took the train out of Panama City bound for Colon at 5:00 o'clock that night. The train did not reach Colon; we had a wreck just to the south of Gamboa. The movement of the train was normal until we reached the place of the wreck. The second car in the train, a refrigerator car, left the track. I went back and tried to find out the cause in order to make out my report. The rails seemed alright. One re-

frigerator car and two passenger coaches were completely destroyed in the wreck, and three were partially destroyed. There were a number of people injured and two persons were reported killed in the wreck; I did not see them; the relief train got them out. I went down the track to the nearest station to get assistance. I understand that a colored woman having a little boy with her were passengers on the train that night. I don't believe I saw them. I understand that they were killed. I do not know the cause of the wreck. In my report of the wreck I stated that it was caused by the derailment of the second car from the engine. I have never ascertained the direct cause of the wreck.

The witness was not cross examined.

23 JAMES ROCK, the third witness called for the plaintiff after being duly sworn in his own behalf testified as follows:

"My name is James Rock. I am the plaintiff in this case. I was married to Mrs. Rock, deceased, in the Roman Catholic Church in Colon, in 1914. My wife will have been dead two years this month. She was killed in the Gamboa wreck. After she and I were married we lived in Colon up to 1915, then I moved to Gatun, Canal Zone, and lived first in private quarters and afterward in quarters owned by the Government. I worked on the spillway for Mr. Jack Walsh. My wife was killed in the wreck of May 20, 1918. On May 15, 1918, I had left the Canal Zone for Cuba, and she was killed on the day I landed in Cuba. I learned of her death through a letter I received in Cuba, and I returned from Cuba on August 16th. On said date I went to the Cristobal police station and

talked to the Captain of Police there, Mr. Calloway, and told him of the fact that my wife had been killed in the wreck. He told me to go to Balboa Heights and take the matter up with the Claim Officer. I saw the Claim Officer on about August 21st; his name was Mr. Helmer. The police sent me to see him. He told me that he was the Claim Agent of the Panama Railroad Company; he told me that he could not handle my claim, that the matter had been turned over to Judge Feuille. He told me that I could see him at his office in Ancon, in the old schoolhouse. Mr. Helmer and Judge Feuille, the attorney for the Railroad, both told me that my wife had been killed in the wreck. At the time of her death she was 38 or 39 years old. While we lived in Gatun my wife did the cooking for me, she bought the commissary supplies, mended my clothes and did my washing. I was making $47.50 per month. I had no children by my wife. My wife did sewing and laundry work aside from her domestic duties, and made about $25.00 a month by sewing and laundry work. We used the money she made between us. She made that amount of money from the time we were in Colon and continued to do after we moved to Gatun. She gave the money to me, and we banked it. I am now making $44.00 per month. I have to pay for my washing now. My board and washing comes to about $20.00 a month. While my wife was living she did my washing and my cooking, mending, and kept house for me. My wife and I got along pretty good, and we had no trouble from the date of our marriage. We lived as a man and wife ordinarily live. When I left for Cuba on May 15, 1918, it was not because of any break up with my wife or any quarrel. I was laid off from work on account of a reduction of force and I had to leave to look for a new job. My intention was to send for my wife as soon as

I had settled somewhere in Cuba. There were good jobs there for colored men to go to and I got a job and came back here to the Canal Zone on hearing of my wife's death. My wife is buried in Corozal Cemetery. The brother who buried her showed me her grave. My wife was never a sickly woman; she was strong and hearty, and I left her so. She was a short woman about four feet something in height and was of ordinary weight. She never had a long sick spell. I never had to pay any doctor's bills because of her, and she had no deformities."

Under cross-examination the witness testified as follows:

"I am a colored Barbadian. My wife was a colored Jamaican. I am now 35 years old and my wife at the time of her death was 38 years old. We were married in 1914. I do not remember the date of our marriage. Father Volk in Colon performed the wedding ceremony. My attorney has my certificate of marriage. I do not remember the date of my marriage, but know it took place in 1914. I do not remember the date of my wife's birth. I have no children and I never had any by Rachael Rock. I was making $47.50 a month when I left for Cuba. I worked on the Gatun spillway. I left for Cuba in May, 1918, and remained there three months less four days. I heard of my wife's death on July 13, 1918, and I arrived on the Isthmus from Cuba on August 16, 1918. I received a letter telling me of her death in the Gamboa wreck. I am now working for the Building Division of the Panama Canal and commenced work a month after my arrival from Cuba. I work in Silver City near Cristobal and live on "D" Street, Colon; I don't know the number of the building, but it is on "D" Street, between 11th and 12th. At the time I left for Cuba my wife and

I were living in Canal quarters at Gatun. When I was in Cuba I wrote a letter to the Governor of the Panama Canal, wherein I claimed damages from the Panama Railroad Company on account of the death of my wife and of my adopted son Lorenzo. I said that the child had been in my care for three years and 8 months. I didn't know at the time whether the child's mother was alive or dead; I never claimed damages for the death of an adopted son.

24 The letter here referred to, dated July 21, 1918, was shown to the witness and by him identified as the letter which has been hereinbefore referred to, and which reads as follows:

(DEFENDANT'S EXHIBIT "A.")

"Havana, July 21, 1918.

"His Excellency, the Governor of the Canal Zone.

I, the individual, James Rock, the husband of the decease Rachel Rock who was killed by the Panama Railroad train passenger on the 20th day of May, 1918, now live in Havana is to my riquest of wrightin you about the deth of my decese whife, and my adopted sun lorenzo which was kild likewise I would like to Know my poesion toward the matter of same. I am awaiting an earley ansur.

I remain yours
Obdent Servent,
(Signed) JAMES ROCK."

"A certain Mr. Carter who works on the Gatun Locks wrote me while I was in Cuba, advising me of the death of my wife. I don't know whether he still works there or not. I am now earning 22c. an hour. I have not

been remarried. At the time I wrote the letter to the Governor, I considered that Lorenzo Ferrero was my adopted son, because of having taken care of the child for three years and eight months. The adopted son which I mentioned in my letter to the Governor is the same child on account of the death of whom suit was brought by the child's mother.

In re-direct examination the witness testified that in referring to the suit which had been brought he referred to the case which had been tried yesterday, involving the death of the child.

This concluded the evidence of the plaintiff, and thereupon the defendant Company by Counsel filed the following motion for a directed verdict in its favor:

"Comes now the defendant company, by its attorneys, Frank Feuille and Walter F. Van Dame, and prays the Court to instruct the Jury to return a verdict in favor of the defendant company, on the following grounds:

(1). The evidence fails to show that the death of Rachel Rock was due to the negligence of the defendant company;

(2). Plaintiff's cause of action is one which does not survive under the laws of the Canal Zone;

(3). The evidence fails to show that any damages resulted to the plaintiff under the laws of the Canal Zone, by reason of the death of the said Rachael Rock;"

which motion was by the Court overruled, and which ruling the defendant company by counsel then and there in open Court excepted.

MR. S. W. HEALD the first witness for the defendant after being duly sworn testified as follows:

"My name is S. W. Heald; I am the superintendent of the Panama Railroad Company and have been so employed for four years; prior to that time I had been employed as yard master, terminal train master and master of transportation. Before coming to the Isthmus I had had twelve years railroad experience with the Chicago and Northwestern. I am acquainted with the train crews of the Company here on the Isthmus. I know their skill and competency as railroad men. I was on vacation in the United States at the time of the Gamboa wreck. Mr. W. F. Foster, Master of Transportation, was acting in my place. Mr. Foster's competency and ability as a railroad man is first class. I know from the official records of the company, the names of the men who made up the crew of the train which was wrecked at Gamboa on May 20, 1918. Mr. Gannon, the engineer was competent and experienced, and a good workman. Conductor Armiger was competent and experienced; he has had twelve years experience on the Isthmus; both of them have qualified as engineer and conductor, respectively. To become a qualified engineer a man has to pass a mechanical examination. After that is passed he must pass a time card examination and an examination on the book of rules. If he passes these examinations satisfactorily and his work has been alright, he is promoted to a qualified engineer and remains so as long as his work and actions are proper. Mr. Gannon is a qualified engineer. Conductors in order to become qualified have to pass an examination on the time card and on the book of rules; they have no mechanical examination to pass. Mr. Armiger is a qualified conductor. There are three different men who might be responsible for the pas-

senger train inspection before a train leaves the Panama end on one of its trips. These men go over the train to see that the coaches have been properly cleaned and water put in them. They then go over them in every respect and look into the safty of the cars and examine every part to see if the equipment is alright. When the engine comes they then connect the air and test it and see that it is alright by actual test. I know officially that Mr. Packard inspected the passenger train which left Panama at 5:00 o'clock on the evening of May 20, 1918. I have known him for seven or eight years. He has been a train inspector for about four years. He is considered one of the best train inspectors which the mechanical division has. His reputation as to carefulness is first class. The mechanical division is responsible for the construction of the company's rolling stock, and Mr. A. O. Herman is in charge of coach and car construction. I have known Mr. Herman for twelve or thirteen years; he is chief of the car shops. Mr. Herman's reputation as a car builder is first class. Mr. M. B. Connolly is responsible for the maintenance of the company's road bed and the proper construction and laying of tracks and ties. I have known him nearly thirteen years during which time he has been the road master of the Panama Railroad. He virtually constructed the relocated line of the railroad. His reputation as a road master and as a careful and prudent man is first class."

In Cross Examination the witness testified as follows:

"All engineers and conductors have to pass an examination on the book of rules. Train dispatchers, the master of transportation, the road master and the superintendent are all required to be familiar with the book of rules. The rules of the railroad limit the speed of

trains to 40 miles an hour anywhere on the road. I cannot tell you the number of the rule; we are not supposed to know the rules by heart. The master of transportation and myself examine the men on the book of rules. There are certain rules in the book of rules authorizing an engineer to use his own judgment at certain times in regard to the running speed of trains. I cannot state the number of such rule nor the substance of it. The rules were gotten up by a former superintendent named Slifer. There is a rule governing the speed of trains in arriving at a station. The matter as to when they shall use air is within the discretion of our engineers. Almost everything so far as the running of an engine is concerned is left to the discretion of the engineer. As to speed limits—there is no one there to tell him about what the rules are, he is supposed to know. The speed limit is 40 miles an hour; the distance across the Isthmus is 48 miles; there are 11 stops on the trip and including the Gamboa Stockade stop there are 12; about three minutes might be deducted for each stop; if there were 12 stops 36 minutes of the running time would be consumed in stops; one hour and fifty minutes are allowed for the trip across the Isthmus. The evening train leaves Panama at 5:00 o'clock and reaches Colon at 6:50. When I said three minutes were consumed at each stop, I included the time necessary for stopping and getting under way again. Engineers are supposed to run on time. They are not checked up unless they are too late or show too much of a loss of time. If an engineer were late, we would ask for the reason. If the engineer were late because he loafed, then we would get after him. We do not altogether rate an engineer's efficiency on whether he comes in late or on time; it is probable that if an engineer is five or six minutes late he would try to make it up on a good piece of track. I don't know at what

places our engineers try to make up time. I suppose some of our engineers have run more than forty miles an hour. In the cases of one or two men, we wrote them letters telling them that we did not want them
26 to do it. Such things have not happened lately. Mr. Gannon has been a qualified engineer for a long, long time. The Gamboa wreck took place while I was away and the investigation as to its cause was closed at the time I returned. I do not know what caused the wreck or who caused it. I cannot see any reason for the wreck. I am not able to state on my oath what caused the wreck. That is something nobody knows. I have access to the records which contain a report of the investigation into the cause of the wreck. I have consulted that file. There were two refrigerator cars in the train. I was here at the time the wreck took place on the Las Cascadas branch of a train with refrigerator cars in it. I don't know whether or not we had a similar wreck in 1908 I do not know the cause of the Las Cascadas wreck and I know nothing of the wreck of 1908. I made an investigation myself of the Las Cascadas wreck. The records of it are in the Record Bureau.

MR. W. F. FOSTER, second witness called for the defendant after being duly sworn testified as follows:

"My name is W. F. Foster. I am the Master of Train Transportation of the Panama Railroad and have been for more than four years. Prior to that I was conductor, yard master and terminal train master. My service with the railroad on the Isthmus dates from 1906. I have railroaded since I was 19 years old. On May 20, 1918, I was the Acting Superintendent of the Panama Railroad. My duties are such as to require me to personally know

the men comprising the train crews on the railroad. I know Mr. Gannon, a locomotive engineer. He was the engineer of the train which was wrecked at Gamboa on May 20, 1918. The conductor's name was Armiger. I know them both for the past thirteen or fourteen years; their reputations as railroad men are A-No. 1 in every respect. Mr. Connolly is the Road Master of the Panama Railroad, and has been with the railroad since about 1898. His deputation as a roadmaster as for care, prudence and skill is A-No. 1. Passenger trains are inspected before commencing their runs. I did not see this train inspected, but we had men there to do that. The train inspector on duty on the afternoon of the wreck was Mr. Packard, whom I have known for six or seven years as an inspector. His reputation in his line of work is of the best, and on the day of the wreck it was of the best, as was also that of the conductor and engineer, and of the road master. Our locomotives and rolling stock are either built or rebuilt by the Mechanical Division of the Panama Canal. Mr. A. O. Herman, General Foreman of the car shops builds all of our cars. I have known Mr. Herman for 13 or 14 years. On the date of the wreck and prior to that time his reputation as a car builder and for carefulness and skillfulness in his particular line was A-No. 1. I arrived at the scene of the wreck in Gamboa about an hour and five minutes after its occurrence. I approached the train from the south end; the parlor car, hospital car and three first class coaches were on the track; the north end of the baggage car was off the track; five second class coaches were off the track and in a demolished condition to a certain extent, and the refrigerator car at the extreme north end of the demolished cars was upside down and lying acrosswise of the track. I examined the road bed and running gear of the derailed coaches and cars sev-

eral times on the evening of the accident, in order to find out if possible the cause of the wreck. I could not ascertain the cause of the wreck. During my examination Mr. Connolly, the Road Master, and Mr. Packard, the Train Inspector, were with me. We examined the trucks of the refrigerator car. The time of the occurrence of the wreck was 5:55 P. M. The wires were broken at the place of the wreck and the lights went out at that time. The train sheet covering the day of the wreck shows that the train which was wrecked arrived at Summit at 5:46 and departed at 5:47 P. M. The lights went out at 5:55 or eight minutes after the train left Summit; the distance from Summit to the place of the wreck is from three to three and a quarter miles. With that in mind I should say that the train at the time it was wrecked was going thirty-three miles per hour. At the place of the wreck thirty-three miles per hour is not a high or an excessive rate of speed."

In cross examination the witness testified as follows:

"I made a thorough investigation of the cause of the wreck and into the manner in which the refrigerator cars were loaded. I did not question the man who loaded the refrigerator cars; insofar as I know, no one questioned him. The regular engineer for the train which was wrecked was Peg Connors. He was on vacation
27 or on lay days, and Mr. Gannon worked in his place. The number of the wreck train was No. 8, and after the wreck we turned train No. 7 and ran it back as No. 8. The train sheet shows that No. 8 reached Colon at 10:00 o'clock. The train dispatcher probably knew of the occurrence of the wreck within ten or fifteen minutes thereafter by telephone. In leaving Summit train No. 8 was probably late, because of heavy traffic

or baggage. Normally it takes No. 8 seven minutes to run from Panama to Diablo. If they were from 5:05 to 5:16 running to Diablo, it was probably because they were tied up at Balboa Heights, which frequently happens. We have no telegraph station at Balboa Heights; there is one at Diablo. It takes three minutes to run from Diablo to Corozal. There is no O. S. station at Corozal. There is a telegraph operator at Pedro Miguel Junction. It should take eighteen minutes to run from Panama to Pedro Miguel Junction, and twelve minutes to run from Pedro Miguel Junction to Summit. If it took No. 8 from 5:30 to 5:46 to reach Summit on the night of the wreck it was probably because of a heavy transfer to the Las Cascadas branch, soldiers or something of that kind. Possibly there might have been a block against the train; possibly they had to flag. It is not peculiar that No. 8 on the night of May 20th should have been late between Panama Diablo; late again between Diablo and Pedro Miguel Junction, and late again between Pedro Miguel Junction and Summit, and that the train lost eight minutes between Pedro Miguel and Summit. Trains frequently do that. One train lost fifty-three minutes between Pedro Miguel and Summit the other day, because the train ahead of it broke down. There are lots of reasons why a train might be late in running between those two points. The engine might not have been steaming, although that was not reported to me. Even though the train did consume twelve minutes in making the run from Pedro Miguel to Summit, instead of eight minutes as allowed by schedule, I would not ask for a report from the crew. No. 8 was due at Summit on May 20, 1918, at 5:40. The time specified is the leaving time at each station, and if No. 8 was O. S'd out of Summit at 5:47 she was seven minutes late. No. 7 on the evening of May 20, 1918, left Colon at 5:10; she was

due at Caimito at about 6:00 o'clock. Caimito was the passing point of trains No. 7 and 8. They were both to be there at about 6:00 o'clock. The distance is eight and one-half miles from Summit to Caimito. I do not know whether No. 7 was on time in arriving at Caimito on that night. There is no telegraph office there, nor is there one at Darien. The last word received of No. 7 on that night was at Monte Lirio. She arrived at Monte Lirio at 5:39 and left at 5:42. According to schedule she should have arrived at Monte Lirio at 5:37. When two trains running in opposite directions are supposed to meet at a point the engineer of the respective trains are not notified of the positions of the trains. For instance; the engineer of No. 8 would not be told that No. 7 had left Monte Lirio on time, unless No. 7 were so late as to warrant a change of the meeting place. Mr. Gannon would not have been notified that No. 7 had left Monte Lirio a trifle late, nor was No. 7 advised that Mr. Gannon had left Summit seven minutes late. Occasionally you will see one train have to wait for another at Caimito, but as a rule the trains pass each other while both are in motion. According to schedule they should pass each other at Caimito at 6:00 o'clock. If either train is late in arriving at Caimito, it will not necessarily cause both trains to be late. In such an event the meeting place of the trains is frequently changed. The meeting place in such cases would be Gamboa and Frijoles. The meeting place would not be changed were a train only seven or eight minutes late. If both trains were eight minutes late at Caimito, they would both be eight minutes in arriving at their terminals. If an engineer continues to arrive late at his terminal, I would investigate the cause of his being habitually late. On the "high-ball" runs in the States, an engineer as a rule is rated on his getting to his terminal on time. If we had a "high-

ball" run on the Isthmus, the run made by train No. 8 would be called a "high ball" run. If I were writing a letter of recommendation for an engineer, and if he had never brought his train in late, I would make mention of it. It would be to his credit. I think every engineer tries to run his train as nearly on schedule time as possible. If an engineer is seven minutes late in leaving Summit, he has a perfect right to try to make up his lost time without exceeding the speed limit. In such a case he is allowed to use his own judgment and is allowed to use his own judgment as to the track upon which he will attempt to make up lost time. There was a thorough investigation made of the cause of the wreck.
28 Neither I nor the Railroad Company can explain the cause of the wreck. I do not know what caused it."

Under Re-direct Examination the witness testified as follows:

"Under the schedule in effect on May 20, 1918, the evening train left Colon at 5:05; under the present schedule the leaving time is 5:00 o'clock, which would make a difference of five minutes in the schedule arrivals at all stations. The train which was wrecked on the evening of May 20, 1918, was a thirteen car train; two refrigerator cars on the north end, five second class cars, a baggage car, three first class coaches, a hospital car, and an observation car. The train was a little heavier than usual. Our schedule is based on a running time of forty miles per hour. Our road bed in my opinion is as good as any in the United States, and is superior to some that I went over last year, including the Pennsylvania. It is suited to a speed of sixty miles per hour. Most of the railroads south of the Mason-Dixon Line and south of

the Ohio River handle refrigerator cars with passenger cars, in the same manner that we do here. Such cars in the states are used for various commodities from California, and for vegetables, chicken, cattle, etc. I was in the States last year and rode on some of the passenger trains of the L. & N. and Illinois Central, which were handling cold storage cars in their make-up."

Under Re-Cross Examination, the witness testified as follows:

"The guage on the Panama Railroad is a different one than that used in the States. Ours is a 5 ft. guage, which I would consider much safer. I do not know whether the railroads handling refrigerator cars in passenger trains were acting under special permission of the Regional Directors of the United States management of railroads. I understand that such special orders were issued to the railroads during the war. The Regional Directors were not political appointees.

Upon Re-Direct Examination, the witness testified as follows:

"Before the European war and before the Government assumed control of the railroads, I myself as a yard master in the United States, have put refrigerator cars into a passenger train and have run such trains as a conductor."

MR. MARTIN B. CONNOLLY, third witness for the defendant, after being duly sworn, testified as follows:

"My name is M. B. Connolly. I am and have been the road master and superintendent of construction of the Panama Railroad since 1898. Prior to that time I worked twelve years in the same capacity with the Erie and eight years as foreman, laborer and water boy on the Pennsylvania. I have never done anything but railroad work. On May 20, 1918, I was road master of the Panama Railroad. My duties as such are to maintain the tracks and bridges, construct any new track, and do anything that is to be done by way of construction in connection with the railroad. I built the re-located line between Pedro Miguel and Gamboa. The road bed is made of Chagres River gravel and I put the road bed in its present condition for the running of trains at the prescribed rate of speed. The ties used on the railroad are the best that we could buy. They are of cypress or yellow pine. We use nothing but the best rail. It is ninety pound open hearth steel. As compared with the rail used in the states, ours is a little heavier for similar tonnage. Seventy pound rail is considered sufficiently heavy for a seventy ton engine, but we have ninety pound rail while our engines do not go much over seventy tons. Our rail is much stronger than necessary, considering the weight of the locomotive. We also use what is known as the 100 per cent angle bar; that means that where the two rails are joined together the angle bar we use is supposed to make the joint 100 per cent as strong as any other part of the rail. We use a tie plate on every tie, regardless of whether the track is on a curve or not. Very few railroads in the states use tie plates on straight track or on grades under 3 per cent. Even the good roads in the states do not use the plates on tangents, while we

use a tie plate on every tie in our railroad. The use of
the plates tends to make the guage better and
29 keeps the rails from spreading and also keeps
the rails from cutting into the ties. I visited the scene of the wreck of May 20th soon after its occurrence. I went out there on the doctors' special and arrived there at about dusk, up to which time nothing had been done in the way of removing any of the wreckage. The first thing I did when I got there and after I heard that the injured people had been taken care of, was to take a track guage and go under the cars. There were marks on the ties for 100 to 125 feet along the track to where the wreck actually piled up. I took a track guage and went under the cars to where the mark first appeared and found the track in good guage and in good line. As soon as I could I examined the flanges of the wheels of the trucks of those cars which had become derailed in order to ascertain if I could what caused the trouble and I could find nothing to indicate what caused the wreck. There were no broken flanges. There were no break beams missing. The trucks were not slewed or knocked out of shape; although they had been through the wreck they were still strong and intact and could have been used again. In fact I think the wrecker foreman did use some of them. I found no marks on the ties to indicate what caused the wreck. The wreck did not go to the outside of the curve as wrecks on curves always do. This wreck went to the inside of the curve. My purpose in examining the wreck was to make repairs and report the cause of the wreck. The cold storage car at the north end of the wreck was turned upside down and was on the track, and we had to transfer the meat in it to another refrigerator car. My men unloaded the car under my supervision. The car was filled with meat and

although it was upside down there was no space between the floor and the meat."

In answer to a question propounded by the Court, the witness answered as follows:

"We have a track walker that goes over the track every day including Sundays. In case of storm or unusually inclement whether, men are kept permanently at places where there are apt to be slides or movements of earth or washouts. The track foreman goes over his section at least once a week personally, and in many places oftener. It is the duty of the track walker to make light repairs and call the attention of the foreman to anything that might be wrong."

Under Cross Examination, the witness testified as follows:

"I and all the other officers of the Panama Railroad made an investigation of the wreck, and the only thing I can state is that I do not know the cause of it. It was one of those accidents which we do not know the cause of. So far as I know the wreck was caused by no natural sources, such as hurricane, earthquake, landslide, tornado or lightening."

MR. A. L. PRATHER, fourth witness for the defendant after being duly sworn, testified as follows:

"My name is A. L. Prather; I am employed by the Panama Railroad Company as a Civil Engineer and have been so employed for ten years. I had no engineering experience in the states prior to that time. I am a graduate

in engineering from Cornell University and have the degrees of Bachelor of Science and Civil Engineer. I graduated from Cornell in 1909. My duties with the railroad are the laying out of curves, grades, the construction of new track, and the solution of all engineering questions that pertain to Panama Railroad construction, and maintenance. I am familiar with the piece of track between Gamboa and Summit. I was at the scene of the wreck twenty or twenty-five minutes after it had occurred. I approached the wreck from the north end and first saw a refrigerator car crosswise of the track. Beyond that were the demolished second class coaches. Next came the baggage car, the north end of which was off the track. The remainder of the train was on the track, with the exception of the first first class coach. The first thing I did after we had looked after some of the injured people was to find out or locate any marks on the ties which would indicate where the wrecked part of the train had first left the track, and I found such marks. After that I took some measurements and located all of the coaches that were standing on the track, looked into their condition, made notes of the distances and recorded them all in a notebook; subsequently I made a blue print or sketch showing the details of the wreck.

The blue print referred to by witness was here introduced in evidence as defendant's Exhibit "B."

The train at the time of the wreck was traveling south coming out of a twenty minute curve and going onto a piece of straight track. The marks where the car truck first went off the track were 76 ft. to the south of the curve. The north end of the baggage car was off the track and buried in the bank; between that point and

the refrigerator car which was turned upside down, were the derailed second class coaches. From the point where the cars first left the track to the upturned refrigerator car was 372 ft.; that is, after the refrigerator had jumped the track it evidently traveled 372 ft. The track was intact. I followed the track for a distance of 115 ft. and the track for this distance and up to about the end of the baggage car was good; from that point on the track was torn up. All of the track from the place where the marks on the ties first appeared to the place where the baggage car stood, was in first class shape, and the train was pulled back over the point where the derailment had originally taken place. The marks on the ties which I speak of, were caused by the flanges of the wheels of a car truck. These marks must have been made by the refrigerator car which was turned upside down and laying at right angles to the track. Our maximum curve on the Panama Railroad is 7 degrees, of which we have four or five, and those are twenty-one times as sharp as the curve on which the refrigerator car truck left the track. The twenty minute curve referred to is not a dangerous one. On the part of the road at which the wreck occurred there is a 1-1/4 per cent grade, that is you go down 1-1/4 ft. in a horizontal distance of 100 ft. It is the hardest grade we have on the railroad. On some of the big trunk lines in the States they have grades as high as 2 per cent, and in the mountainous sections of the United States, they have 4 and 5 per cent grades. The distance from Summit to the scene of the wreck is 3-3/4 miles; the distance from the place of the wreck to Gamboa Stockade platform is 2276.8 ft.; the distance from Gamboa Stockade platform to Gamboa station is 1 mile; the distance from Gamboa station to the south end of the Caimito switch is 2-3/4 miles. The total distance from Summit to the south end of the switch at Caimito is

8 miles. All curves are constructed with the outer rail elevated in order to overcome the horizontal push of a train in rounding a curve and to prevent the tendency which it would have to fly off in that direction. The elevation of the outer rail at the curve is based upon the usual running speed of 40 miles an hour, so far as the Panama Railroad is concerned, and the elevation is figured, in such a manner as to make the rate of speed on curves as safe as the same rate of speed on a tangent would be. On a twenty-minute curve the elevation of the outer rail over the inner rail would be one inch; for a 1° curve, the elevation would be two inches. I checked the elevation under the wreck after the accident and found it to be at a correct elevation. The average grade between Gamboa and Summit is about one per cent. Assuming that the train which was wrecked left Summit at 5:47 and that the wreck occurred at 5:55, and that the distance between those two places was 3-3/4 miles, then the speed of the train at the time of the wreck was between thirty and thirty-one miles per hour."

Under Cross Examination the witness testified as follows:

"The weight of the engine attached to train No. 8 which was wrecked was 73 tons or about 146,600 pounds. I cannot give the weight of the individual cars behind the engine. I don't know whether or not a train in going over the top of the grade at La Pita toward Gamboa if the steam were shut off and no breaks set would gain speed or not. The capacity of the refrigerator cars used in the wrecked train was 35,000 tons. So far as the contents was concerned, the cars were loaded to capacity, but were not loaded to weight capacity. The elevation of the outside rail on the curve balances the centrifugal

and centripetal forces of a train rounding that curve. About 215 to 220 ft. of the track was actually torn up; that is the track between the head of the baggage car and the place in which the upturned refrigerator car was found. The truck which made the marks on the ties was presumably one of the trucks of the second refrigerator car. One car leaving the track would not necessarily pull the cars behind it off the track. I do not know by name which railroads in the States have four and five
31 percent grades: I have read of such matters in "Engineering News" statistics. If this train had not been going as fast as it was the coaches would not have been splintered up as badly as they were. Two or three of the second class coaches in the wreck were more or less demolished. If the speed of the train had been less, the danger of course would have been less. If the road bed is in perfect condition and the equipment is in perfect condition and the train is run at a safe rate of speed, there is not much likelihood of the train leaving the track. If the maximum speed limit were exceeded, there would be liable to be a derailment. There is always a maximum of safety as to the speed of trains and if that speed is exceeded they are liable to go off the track. I can't state how far the train went after leaving Summit before it attained a speed of thirty miles per hour. I think that the train could have picked up a thirty-mile an hour speed by the time it arrived at La Pita, about a mile from Summit; no train starts off at thirty miles per hour; that speed must be picked up. If the train did not attain a thirty-mile an hour speed for the first mile and a quarter, then its average would necessarily have been greater.

MR. A. O. HERMAN, fifth witness called for the defendant, after being duly sworn, testified as follows:

"My name is Albert O. Herman. I am employed as General Foreman, Car Department, Mechanical Division, of the Panama Canal, and have been so employed for six years. Prior to that time and from 1905 I was Assistant General Foreman and Foreman. Prior to that time, I worked six years as lead man, two years as foreman of freight shop for the Pennsylvania, and three years as foreman of the freight car inspection and passenger car inspection service. My duties are to see that the Panama Railroad Company's rolling stock is properly maintained; make any suggestions, and look after the proper inspection of freight and passenger cars at the terminals. I built some of the rolling stock of the railroad at the shops. We recently built six refrigerator cars and we have built four new passenger coaches for the Panama Railroad, and we have built cars of all kinds for the use of the United States Army. Our standard of construction and inspection is prescribed as by the Master Car Builders rules in force in the United States, Canada and Mexico. The Master Car Builders' Association is an organization of experienced car men, car construction foreman, men who have charge of wreck work, and also engineers. Practically every road in the United States, Canada and Mexico belongs to the Master Car Builders' Association. They have yearly meetings at which all phases of car work are discussed, and at which suggestions for improvements are made. These suggestions are afterwards submitted by letter ballot to each member. As a result of the ballot the Association learns what is best to do. I am a member of that Association. The more important parts of a car which enter into the safe handling of it are standardized; each piece is required to have

a certain strength; you can increase it, but you cannot decrease it. The less important parts of the car are governed by a proposed standard which you are not compelled to follow. The standards you must follow. The proposed standards it is advisable to follow, because they will ultimately become standards. I was on the Isthmus on May 20, 1918; I did not view the wreck, but saw the results of it when the wrecked cars came into the shop. There was only one cold storage car brought into the shops as the result of the wreck. It was car No. 7022. It was inspected immediately upon its arrival in Colon, for any part that might have become broken and might have dropped on the track between the rails and thus cause a derailment. The foreman in Colon was right on the spot when the car came in, and found nothing missing, not ever a cotter key. I had seen cold storage car No. 7007 prior to the wreck. About a year before the wreck we began to equip cold storage cars with steel under frames gotten from the States from the Commonwealth Steel Company. We had also ordered cast steel trucks from the States to put under our refrigerator cars, because they were getting the hardest service of any cars on the Isthmus and the maintenance cost of them was high. The steel under frames and steel trucks decrease maintenance cost. At the same time we had an order from the railroad company to build six new cars. The first six under frames and trucks were put under the six new cold storage cars; then in 1917, refrigerator car No. 7007 which was one of the old cars, was taken into the shop and was practically entirely rebuilt and new wheels were put under her. It was equipped with steel under frame and steel trucks. When the car arrived at the shops
32 the damage it had sustained was really light, except that when in trying to unload the beef and not being able to get it out, they had rolled the car

over and chopped holes in it. The trucks of the car were practically as good as when it left the shops. Nothing was broken on them. Everything was intact, except the top connecting rod which was broken, but still hanging to it. There two or three 4-5/8 inch bolts torn off; the steel underframe was bent, but it didn't take much to rebuild it. The car stood the wreck wonderfully well. The train inspection at both terminals is under my supervision. I know Mr. Packard; he is a car inspector at the Panama Passenger Station and has been there for five and one-half years. His duties are to look over the equipment as soon as it reaches the terminal, and when it is set out in the yard he is supposed to go over it again, and before the train leaves he is supposed to go over the train and try the air. Passenger cars are looked over between runs, before going out, and on coming in. Mr. Packard's reputation as to his work and ability is perfect. The difference between the construction of a cold storage car such as was No. 7007, and a passenger car, is a difference in the trucks. We want passenger cars to run as smoothly and to be as easy riding as possible on account of the comfort of the traveling public. For that reason, passenger trucks, although they have the same wheels and axles as the cold storage car, have two sets of springs. Passenger cars have equalized springs and elliptical springs so that the weight of any uneven place in the rail is transferred from one spring on one end of the truck to the other spring and by the time the jolt reaches the coach it is minimized as far as it can be. That is the difference between passenger cars and freight cars. We have also different kinds of couplers for them, because their construction is different. Passenger cars are equipped with signal pipes, and so are all of our refrigerator cars, in order that they may be run in

passenger trains. There is no difference between the speeds at which a passenger coach and a refrigerator car may be run, except that the passenger coach is easier riding. Meat trains in the States have the reputation of running fasterthan passenger trains and making better time. We have built quite a few cars for the Army and different kinds of cars for air craft guns, ammunition cars, and searchlight cars. We have built about 450 new cars for the Army. We have shipped about 700 cars to Alaska and about 100 to Chili and Peru, and 400 to the Chicago House Wrecking Company. We have never heard any complaints from any of our cars; on the contrary, the people want to buy more. Cold storage cars in the States are used almost solely for perishable goods, and are mostly handled in solid trains. Again they are mixed up with freight trains, and again are run on passenger trains. On the Pennsylvania, refrigerator cars are handled in the trains that get them over the road the quickest; sometimes in solid trains and when there is only a car or two they are placed in passenger trains. Refrigerator cars in service on the Pennsylvania are equipped for passenger service and have different triples from box cars. I cannot say that it is usual to run cold storage cars in passenger trains in the States. No railroad man likes to have refrigerator cars in a passenger train. However, the Regional Director for the Northwest Region under the Railroad Administration, issued a circular on July 9, 1919, instructing all railroads that when they saw a refrigerator car in freight service to pick it up and put it into passenger train service; because of the scarcity of cars, refrigerator cars would be held and loaded with freight, so he issued orders making it compulsory to handle them in passenger trains for carrying food."

Under cross examination the witness testified as follows:

"The Regional Directors were competent men. They appointed men like the President of the New York Central and Mr. Atterbury of the Pennsylvania to the jobs of operating the railroads. They were the best of railroad men. I don't know who the Regional Director was for the Northwest region. He was a competent man. There is a good reason for the fact that the operation of the railroads by the United States resulted in a loss of more than one million dollars a day. The railroads had been held down by the Interstate Commerce Commission; their rates had been held down for many years, and even before the Government took them over they were at the end of their rope. The Government took them over and increased the rates, but they also granted increases in pay with back pay. If the Government had increased rail-
33 road rates six months earlier, I think they would have broken even. The loss of railroad operation was about nine million dollars, but was not due to mismanagement. It could have been saved if an increase had been allowed them a year ago. As a general rule when I worked in the states we hated to see cold storage cars in a passenger train, for any man likes to see a nice looking passenger train. In the states I worked one year for the Merchants Dispatch Company with my tools building refrigerator cars; I worked for the New York Central for three years on all classes of cars. I never worked in the operating department of a railroad, but in the shops only. But when you are in charge of freight inspection and are in charge of inspectors you become pretty well acquainted with the operation of a railroad. I was in charge of inspection work of the P. C. C. & St. L. in Cincinnati. I don't know how many re-

frigerator cars they were running out of Cincinnati at that time. They were not running them every day. I cannot tell you the name of the shippers running refrigerator cars out of Cincinnati. Cincinnati is an important interchange point. I cannot tell where those cars originated. I cannot tell you how many refrigerator cars I saw in operation per day. I saw trains made up solely of refrigerator cars passing through Cincinnati, coming from the Southern. I am not familiar with the operation of cold storage cars in the west. One sees a lot of refrigerator cars going over the New York Central and the Pennsylvania. I have not been in the states since 1918. I can only tell you that in my time, and as late as 1918, when I asked about it, refrigerator cars were operated at the head of passenger trains whenever the occasion or necessity required. I saw them myself. I can not say whether they were at the head end or at the rear of the passenger trains. I saw a great many refrigerator cars and box cars in repair yards. These yards are not always near the big yards; they are sometimes miles and miles away from them. I am not employed by the Panama Railroad, but by the Panama Canal. I have charge of the making up of rolling stock for the railroad. Mr. Packard the car inspector is under my supervision. Panama Canal car inspectors have been doing the work for the Panama Railroad Company since 1911 or 1912. The Panama Railroad employs no car inspectors; they depend upon the Panama Canal inspectors. These inspectors are not under the superintendent of the Railroad. The Mechanical Division of the Panama Canal has taken over all of the shops of the Railroad Company and employ all the men. We do the work for the railroad and bill the railroad for it. It is more economical than having two sets of shops. If Mr. Heald or Mr. Foster want something done and tell Mr. Packard, he

will do it. The Panama Railroad employs no car inspectors. We built 400 cars for the Chicago House Wrecking Company. We have also built cars for the Guggenheim's Chilean Exploration Company, but for no other South American countries. The cold storage cars weigh from 54,000 to 59,000 pounds. That is of the type No. 7007 was. Refrigerator car 7022 weighed 46,700 pounds. The weight of a first class coach such as was in the wrecked train is about 73,000 pounds. The second class coaches in the train weighed 69,000 pounds each. The capacity of these refrigerator cars was 70,000 pounds; both cars had the same capacity. The baggage car weighed 75,000 pounds. Baggage cars are heavy because of their solid construction; they have no windows. Our express cars are made upon the same specifications as those used in the states. Express cars are sometimes run in solid trains in the states. They are purposely made heavy. You could not make them any lighter. If a baggage car weighed only 60,000 pounds or 50,000 pounds, it would not last, it would be weak, because it would be too light. I suppose the floor line in a baggage car would be about its center of gravity. In the 69,000 pound second class coach, the center of gravity would be about the top of the seats. Our first class coaches weigh 73,000 pounds and our second class coaches 69,000 pounds. The difference is made up by heavier seats in the first class coaches. The second class coaches have benches in them. The baggage car is practically of the same weight as a first class coach. The trucks and the under frame are the same in our baggage coaches and first and second class passenger coaches. The under frame of a refrigerator car is different; the difference is in the trucks. The trucks and under frame of a passenger coach is heavier than those under a refrigerator car. The difference in weight is made up by the springs in the passenger

coach trucks. A refrigerator car is 36 feet long, while a passenger coach is 61 feet long. I have had twenty-nine years experience in railroad work and have conducted experiments in order to ascertain the cause of the Gamboa wreck. I do not know the cause of the wreck. When a car tips over, its center of gravity is thrown out of place. The center of gravity of a baggage car is about the same as that of a refrigerator car. It is
34 about 6 feet above the level of the track and is about the same in a passenger coach. In a refrigerator car it is 6 ft. 8 inches above the rail. In conducting experiments as to the center of gravity of a loaded car, we did not figure on a load of 14 tons, but on a load of 29 tons, which was possibly double what the wrecked car was really loaded at, which put the center of gravity 8 feet, 8 inches above the rails. We figured a 29 ton load and should have figured about half that much. Refrigerator cars have ice at both ends of them, which would affect the center of gravity. The shifting of a load in a car would affect the center of gravity. If the center of gravity of a car is 8 feet 8 inches above the rails that center in order to cause the cars to tip would have to go outside the rails. It would have to move 2 feet 6 inches in order to fall over. Our experiments were conducted on a track 5 feet wide."

Upon re-direct examination the witness testified as follows:

"The experiments I speak of were conducted upon the assumption that the car was loaded twice as heavy as the wrecked cold storage car actually was loaded. We desired to figure it under the most extreme conditions. We did not know the cause of the wreck. We thought possibly the center of gravity might be too high for safety and

so we took into consideration all the conditions which we could think of. If the load in the refrigerator car was actually only half as heavy as the load we used in conducting our experiments, the center of gravity of the wrecked refrigerator car would have been much lower than 8 feet 8 inches above the rail, but I am not prepared to state how much lower.

Under re-cross examination the witness states as follows:

"If the wrecked refrigerator car was loaded clear to the roof and if both ends had three tons of ice in them, the center of gravity would of course have been much higher than if the car had been empty, and it would not have taken as much to upset it, as it would to have upset a passenger car. It takes some force to turn over a loaded car, and it also takes some force to turn over an empty car. I am not prepared to state whether it would be easier to tip a loaded refrigerator car than an empty one.

MR. H. F. GANNON, sixth witness for the defendant after being duly sworn, testified as follows:

"My name is H. F. Gannon. I have been employed by the Panama Railroad as a locomotive engineer for thirteen years, and was so employed on May 20, 1918. On that date I was pulling train No. 8. I was called to leave Panama on No. 8 on the aforementioned night. I coupled onto the train and tried the air which I always do. The car inspector also tried the air. We left the station at 5:05. Everything went along alright until we arrived at the south side of Gamboa Stockade, near which

place we had a wreck. I left Summit and was going down the hill after we tipped over it at La Pita. After the train got under motion I tried the air in order to see that everything was working alright. After I knew that it was working, I released and drifted on down to just south of Gamboa Stockade, when I saw a flash of fire reflected on the front of the cab and I looked out of the corner of my eye and saw that the electric transmission tower was down. I asked the fireman what was the matter and he said, "We are broken in two." I released the air which I had set to get away from the rear end of the train and I went down around the curve to Gamboa Stockade and saw the warden of the penitentiary, and told him to call up the electric sub-station at Gatun and tell them that the wires were down. I instructed the fireman to go around the curve ahead of me and when I got back there I found out that we were wrecked. After leaving Summit, my nearest scheduled stop by the time card was Gamboa, but we had a bulletin ordering us to stop at the Stockade. The wreck took place about one-half mile south of the Stockade. We were under orders and would have stopped there. I had just made a seven pound reduction in the air preparatory to stopping at Gamboa Stockade. The effect of a 7 pound reduction was to bring the break shoes up against the wheels, and the slowing down of the train. It would start to steady the train preparatory to a stop. At the time I made the reduction in the air I was going between 33 and 35 miles an hour as near as I can judge. Considering the track, road bed and equipment of my train, it was a 35 safe rate of speed. I have passed over the same track under the same conditions and at the same rate of speed before and since the accident. Leaving Summit the grade is lightly up hill to La Pita, which is marked as a continental divide; La Pita is a little

more than a mile from Summit. From La Pita toward Gamboa there is a light down grade. In leaving Summit you go up a slight hill a distance of a mile and a quarter to La Pita; then you go down grade from La Pita and from there to the place of the wreck is from 2-1/2 to 3 miles. When I reached the hump at La Pita, I think I was going 25 or 26 miles an hour. After passing over the hump I was in no hurry on this night. I had a meet with No. 7 and they stuck me on the night before at Caimito. I had to stop at Caimito and they were to take siding so I made up my mind that I would not be in too much of a hurry and let them in the clear, so I would not have to stop; I had a large train. After passing La Pita and at the time I made a reduction in the air near the scene of the wreck, I was going from 33 to 35 miles an hour in my best judgment. I had tried the air after I tipped over the hill. We have a rule and I guess all railroad companies do, that upon starting down a grade, the engineer is supposed to try the air, and see that it is in working condition. I tried the air then and knew that everything was working. I don't know what rate of speed a train would attain if in going down over the hill toward Gamboa one would not apply any air at all. I have never done that and it would be a hard question to answer. There was no reason for my being late in leaving Summit, except that I had a heavy train out of Panama and made a connection at Pedro Miguel. We had a lot of baggage to load and at mile 36, south of Summit on the brow of the hill, we stopped to pick up a gang of prisoners who were to get off at the Gamboa Stockage. Starting a train out of there is pretty hard and we lose a little time."

Under Cross-Examination, the witness testified as follows:

"The place where we were ordered by bulletin to pick up prisoners at Mile 36, is on a little hump which makes it pretty hard to start the train with thirteen cars hanging down the hill. No such condition exists at Summit. Summit is the real top of the hill and La Pita is on a plateau. Two and a half miles south of Summit there another divide which is almost level. Summit is in about the center of the level space on top of the hill. We engineers have always considered our engines to weigh about 90 tons. That would not be considered a big engine in the states, but it is not small, considering the size of our trains. Thirteen loaded passenger cars makes a pretty heavy train. I could not tell the entire length of my train that night, not knowing the length of all of the cars. The approximate length of a car is 60 feet; refrigerator cars measure about 36 feet or 45 feet over all. I had thirteen cars in my train including two refrigerator cars. The length of the train would be about 13 times 60, or 780 feet to 800 feet. In leaving Summit, by the time I had gone a train length, I would have been going five or six miles an hour. I cannot tell you how fast I would have been going after having traveled two train lengths. A man running an engine has to look out for many other things. The prisoners I referred to were taken on south of Summit. The effect of a 7 pound reduction in the air is to put the shoes up against the wheels. If the brakes were set in that manner, a man could not move a car with a pinch bar; the shoe would be up against the wheels. A 7 pound reduction exerts a pressure against the wheels and would in time stop the train, but not as quickly of course as a heavy reduction. A 7 pound reduction merely steadies a train. I made a 7 pound reduction in the air to take up the slack in the train. I can't say that a 45 ft. car weighing 55,000 pounds would be jolted by a 7 pound reduction in the air

more than a 75,000 pound car would be. I can't say how much of a jolt it would take to throw a car off the track, nor how many inches of space there are between the flanges and the rim of a car wheel. A flange is about 1½ inches deep and a car which would receive a jolt which would rise about 1½ inches would not necessarily bring the flanges on the tops of the rails. I don't know whether a refrigerator car would be affected in that manner or not. In rounding a curve, if a flange goes over the rail, then the car goes off the track, but it could not get a jolt as hard as that while in the train. We think that the second class coaches were derailed because the refrigerator car went off the rails. The cars following the refrigerator cars smashed into. The cars were
36 broken because they hit the side of the rock cut.

If the refrigerator cars had been on the hind end of the train I guess they would not have wrecked the second class cars. The American people on the Canal Zone would not travel in the parlor car with a refrigerator car behind them. I asked the warden at the penitentiary to telephone the sub-station that the transmission wires were down. I can't say that the wreck would not have occurred had I been going only 15 miles an hour, because everything dropped out of a clear sky. If an entire train is in perfect condition and the road bed is perfect, and if everything is perfect, if the train only moves at the rate of 4 miles an hour, it will not leave the track unless something happens to make it leave. I would not say that the danger of derailment would be any greater at 70 or 80 miles an hour than it would be at 4 miles an hour. Cars in going around a curve on a down grade do not have a tendency to sway if the track is level and smooth. I did not notice that any of the cars were swaying on the night of the wreck. The track down the hill toward Gamboa is the best piece of track we have, and

is as smooth as any piece of track we have. Knowing that I had a stop to make at the Gamboa Stockade which was a half mile away, I made a reduction in the air, and at the time was going from 33 to 35 miles an hour. Furthermore, there is an automatic signal around the curve and if that had been down we would have had to stop. It was not down on the evening of the wreck, but we go around there prepared to stop, so as not to jolt the train. That is why I made that light reduction; and if the fireman would have said "clear" I would have reduced the air again. I have been running an engine 15 years and have railroaded for 17 or 18 years. I have seen cars off the track, but I never followed wrecks carefully. I attended one investigation concerning the wreck. I do not know the weight of my train on that night. I do not know whether the two refrigerator cars were full or empty. On the night of the wreck I was extra on that run, but I had held the same run regularly; that was about a year ago, or a year before the wreck, during the time Mr. Connors was on vacation, I do not know the cause of the wreck, and have not heard any of the Panama Railroad officials state what the cause was. They seem to be as much in the dark as I am myself."

MR. GEO. ARMIGER, seventh witness for the defendant, being duly sworn testified as follows:

"My name is Geo. Armiger. I have been employed on the Panama Railroad for sixteen years as a conductor. Prior to that time I had six years railroad experience in the States, about twenty-two years in all. On May 20, 1918, I was the conductor on train No. 8. The makeup of the train on the night of the wreck was not different from what the makeup of trains has been in the past ten or twelve years. It was a mixed train, with two or

three refrigerator cars behind the engine, four second-class coaches, two large and two small, a baggage car, three first class cars, a hospital car, and a parlor car. After the train was inspected it was my duty to see that the train moved from the terminal on time. We left Panama on time, 5:05. P. M. Movement of the train was normal. We had a heavy train and I asked the dispatcher if he would reverse the rights of the train and have No. 7 take siding instead of No. 8. We had no train meets except No. 7. We had a stop to make before we reached Summit, in order to pick up the prisoners. We got the prisoners on and left Summit about 7 minutes late. That was nothing unusual for a train of this sort, and with the meet was had with No. 7, and No. 7 taking the siding, it was equivalent to saving 4 minutes, because taking the siding, we would have had to open the switch and close the switch, to get in and out of the passing track which would have taken us anywhere from 4 to 5 minutes. That left us into Summit about 2 minutes late. There was no occasion for our being in a hurry and I had finished my work on the train and had everything ready for the stop at Gamboa Stockade. As I remember, I was sitting down, or was about to sit down when there was an indication that something was wrong with the train. While trying to look out the window the car I was in was derailed and the whole wreck was over in 30 seconds from the time of the first derailment of the refrigerator car until we came to a stop. It was my duty then as conductor, to make a report of the wreck, the condition of the injured, the material required, the rate of speed we were going, and so I had to investigate that as soon as I could. I failed to look at my watch which I should have done and enter the time on my train book. But in the confusion
37 I did not notice the second that the derailment took place. After I had the relief work started,

I got on the engine and went down to the Gamboa Stockade and reported the condition of the wreck, the medical assistance required and the number of hospital cars required to convey the injured. Then I got the track foreman from Gamboa with a track gauge and went up there to try to find the cause of the wreck, and the track where the first car left the rail, I found in good condition. I put down that the cause of the wreck was unknown so far as I could ascertain. The refrigerator car was the one which caused the wreck of the train, but I do not know what caused the refrigerator car to leave the rails. On the evening of the wreck we were not running at any unusual rate of speed. We have often gone over the same piece of track at the same rate of speed, both before and since the accident, and with the same equipment.'

Under Cross-Examination the witness testified as follows:

"My opinion now is that at the time of the accident we were going at the rate of 29 miles an hour. At the time of the accident I was of the opinion that we were going 40 miles an hour, and so reported. My opinion was changed the next day by the Acting Master of Transportation. We were schedule to meet No. 7 at Caimito at 6:00 o'clock. We had arranged for the south bound train to take the siding. Our train was the north bound train, so that we would not be delayed there and could save 4 or 5 minutes. We were 7 minutes late and did not want to lose any more time. We had an order to stop that night at the Gamboa Stockade and let off a gang of prisoners. Stopping, letting passengers off, and starting takes about 3 minutes. I think that about 100 prisoners would get off the train in half the time it would take that many passengers to get off. They are

under discipline, generally they are standing and ready to get off at the point of disembarkation, and they will leave from both ends of the car. I think a car load of prisoners would leave like a car of soldiers, in less than two minutes, so that the actual time lost in stopping at Gamboa Stockade would not have been more than two and a half minutes. We were also scheduled to stop at Gamboa, but there is very little to do at Gamboa, little express business and it only takes about 2 minutes usually to make the stop, and the actual time we would have lost in making the two stops would have been about 4-1/2 minutes. We were seven minutes late and didn't want to lose any more time. We left Summit at 5:47 and were due at Caimito at 6:00 or 6:05, I don't remember which. According to the time card we were due at Caimito junction on May 18, 1920 at 6:00 o'clock. The time card shows Caimito junction to be at Mile 26, and a fraction, and Summit to be at mile 35. We, therefore, had 9 miles to go from Summit to get to Caimito; according to schedule we had to be in Caimito at 6:00 o'clock, but as a matter of fact we didn't have to get there by 6:00 o'clock. I have not learned the cause of the wreck, and none of the Panama Railroad officials know the cause. Some say it is one thing and some say another. The only supposition would be that he was exceeding the speed limit, but I feel absolutely sure that he was within that limit. It was the opinion of some men that salt water coming from a refrigerator car had a certain effect on the friction of the bearings. It depends on the combination of conditions as to whether or not the wreck would have occurred had the refrigerator cars been at the tail end of the train. If the refrigerator cars had been at the tail end of the train and had gone off the track, I don't think it would have broken up the passenger coaches. I testified as a witness in the trial of the case of Camila

Castilla against the railroad on the day before yesterday. In that case I testified that the rate of speed of the train at the time of the wreck was from 35 to 40 miles per hour as judged from the conditions on that night."

MR. C. R. PACKARD, eighth witness called for the defendant company after being duly sworn testified as follows:

"My name is C. R. Packard, I am a car inspector and have been for six years. Prior to that time I worked in the car shops of the Mechanical Division, Panama Canal. I have worked on the Isthmus a little more than 12 years. I had experience in the States along the same line, of about four years. My duties as car inspector are to examine cars on the arrival of trains and on their departure; to see when they arrive if there is any defect that needs repair, and to see if there are any defects sufficient to send the car to the shops; also to ex-
38 amine the cars when they are ready to go out and to see that they are supplied with water and ice and are properly cleaned, and to see that the running gear is in proper order. My usual place of work is the railroad station in Panama, and I was at work there on the evening of May 20, 1918, and inspected train No. 8 on that day. When I first came to work at 4:00 o'clock the greater portion of the train was in order, and it was supposed to have been already carefully inspected by the man whom I relieved at 4:00 o'clock, because the equipment generally arrives at the station a little before 1:00 o'clock. I inspected the part of the train which was there by walking up and down each side, looking over the train, taking note that the lamps were being lighted, and sometime before 5:00 o'clock the two refrigerator cars were

placed at the front end of the train and coupled on. I coupled the air and made a thorough examination of them so far as was possible without opening the doors. After the engine arrived and was coupled onto the train, I connected the air and applied it. The brakes were applied from the engine and I went the length of the train to see that they were all properly applied and gave a signal to release from the rear end of the train. They released and then I went over the train from rear end to the engine to see that they were all properly released. Everything on train No. 8 was in good shape. My immediate superior is Mr. A. O. Herman. He is General Foreman of the Car Department. The makeup of train No. 8 was no different than other trains leaving the Panama Railroad Station at that time of the day. There are probably more times that the evening train goes without refrigerator cars than with them I think. Probably a third of the time refrigerator cars are carried in the evening train. The refrigerator cars have always been placed in the train next to the engine; that has been the practice ever since I have been an inspector at the Panama Station."

Under Cross-Examination the witness testified as follows:

"I am on the payrolls of the Mechanical Division of the Panama Canal. I do not know any Panama Railroad employe who is doing the same work that I am. The Panama Railroad has no train inspectors on its payroll. I heard of a wreck of a train with refrigerator cars in it on the Las Cascadas branch since May 20, 1918. I don't know of another wreck of that kind in 1908. I have no knowledge whatsoever of the cause of the wreck of May 20, 1918."

MR. W. T. LUNDIN, ninth witness called for the defendant company after being duly sworn testified as follows:

"My name is W. T. Lundin. I am the Refrigerating Engineer at the Balboa Plant and have been for about four years. I handle beef coming from Cristobal to Balboa and from Balboa to Cristobal, and also manufacture ice. Beef is brought to Balboa to be frozen. On May 20, 1918, I was doing the same work that I am doing now. On May 20, I loaded refrigerator cars No. 7007, and 7022. Car 7007 was loaded with three tons of ice and 227 quarters of beef, at the average weight of 120 pounds each. By the time 227 quarters of beef had been placed in the car, the car was loaded right to the ceiling; it would have been impossible to get another pound of beef into the car. It would have been impossible for the load to shift or creep. The car was not loaded differently from any other cars that I loaded prior to that time."

Under Cross-Examination the witness testified as follows:

"I am in charge of the refrigerating plant at Balboa and have an office in the engine room. I supervise the whole plant. I have straw bosses working under me. He handles beef and does repair work in the plant. I supervise the loading of cars and the running of the plant. I stand there while they load beef in cars and tell them how to load every car. Car No. 7007 will taken a ton and a half of ice in either end. I loaded the car with approximately 27,240 pounds of beef, making about 17 tons, including the ice. The other refrigerator car was loaded in the same way, and had the same number of quarters of beef in it as had No. 7007. I loaded hind quarters into

7022 and fore quarters into 7007. I made no statement to anyone as to how I loaded the car, and was not called on to make a statement, nor was I present at an investigation held by the railroad as to the cause of the wreck. After the car was loaded I reported to Mr. Chelf, Panama Railroad Yardmaster as to the weight of beef in the cars. That was at about 4:00 o'clock in the afternoon of the day of the wreck. I have worked in refrigerating
39 plants since I was 15 years old. I know nothing of refrigerator cars. Salt was used in the old cars, but they changed that three years ago. I put no salt in the cars, on May 20, 1918. I put about ten blocks of ice into each end of the cars. I do not know what caused the wreck, nor have I formed any opinion as to the cause of the wreck."

Which was all the evidence adduced at the trial by either parties.

And thereafter counsel for the defendant filed its written motion for a direct verdict, which omitting the caption, read as follows:

"Comes now the defendant company, by its attorneys Frank Feuille and Walter F. Van Dame, and prays the Court to instruct the Jury to return a verdict in favor of the defendant company, on the following grounds:

(1) The evidence fails to show that the death of Rachel Rock was due to the negligence of the defendant company;

(2) Plaintiff's cause of action is one which does not survive under the laws of the Canal Zone;

(3) The evidence fails to show that any damages resulted to the plaintiff under the laws of the Canal Zone, by reason of the death of the said Rachel Rock."

The Court overruled the aforementioned motion for a directed verdict for the defendant company to which ruling an exception was then and there saved by defendant.

Thereafter arguments of counsel were addressed to the Court and Jury.

At the conclusion of the aforementioned arguments counsel for defendant filed the following written requests for instructions to the Jury:

Defendant's request for instructions No. 1.

"Gentlemen of the Jury:

You are instructed that the defendant company is not an insurer against injuries to passengers, and that there was no implied contract between the defendant and the plaintiff guaranteeing that the latter would be transported safely. The plaintiff's right of action in this case, if any exists, is based upon the specific charges of negligence set out against the defendant in plaintiff's complaint, and the burden of proof that the defendant was negligent, as charged in plaintiff's complaint, is on the plaintiff; and, therefore, unless the jury believe from the evidence that the defendant was at fault in respect to the way the train in question was managed and that the plaintiff was thereby injured; or the company constructed its roadbed so unskillfully and imperfectly and suffered the same to be in defective condition as to result in the injury complained of; or that improper equipment was used in making up the said train, or that said train was being operated at such a dangerous rate of speed upon a down grade and at a curve as to cause one of the said cars to run off the track and drag from the same and overturn the car in which the plaintiff was seated, your verdict must be for the defendant.

"In applying the foregoing instructions to the facts of the case, the jury should bear in mind that the law requires of the defendant in this case that degree of care which prudent men would take to guard against all dangers from whatever source arising which may naturally and according to the usual course of things be expected to occur. The defendant is not an insurer of the safety of its passengers further than could be required by the exercise of such a high degree of foresight and prudence with reference to probable dangers and in guarding against them as would be used by every cautious, prudent, and competent person under similar circumstances. The defendant in this case was not required to use the utmost degree of care which the human mind is capable of imagining. Such a rule would require from the defendant such an expenditure of money and the employment of hands as would prevent all persons of ordinary prudence from engaging in the railroad business. You are advised that the rule requires that the highest degree of practical care and diligence should be used that is consistent with the mode of transportation adopted, and you are further instructed that the speed of train, although you may find it was unusually high at the time of the accident, of itself would not constitute negligence if unaccompanied by any other circumstances tending to prove want of care in the defendant in the manner and form as charged by the plaintiff in his complaint.

"You are further instructed that in determining whether the defendant has been negligent in the manner and form as charged by the plaintiff in his complaint you cannot assume from the mere fact of the accident that the defendant was negligent. The law authorizes you to draw reasonable inferences from the facts proven, and only from the facts proven, and without this basis of fact you

are not authorized to indulge in inferences as to the defendant's negligence."

Defendant's request for instructions No. 2

"Gentlemen of the Jury:

You are instructed that under the laws of the Canal Zone you cannot allow the plaintiff anything by way of solatium for his grief and wounded feelings, or as a compensation for the mere loss of society or companionship, which he has sustained because of the death of his wife."

Defendant's request for instructions No. 3.

"Gentlemen of the Jury:

You are instructed that if after hearing all of defendant's and all of plaintiff's testimony adduced during the course of the trial you are of the opinion that the cause of the accident has not been explained and cannot be reasonably and logically deducted or inferred from all of the testimony in regard to the wreck which you have heard, then in that event I charge you that plaintiff has failed to establish the negligence of the company by a proper preponderence and weight of the evidence, and your verdict must be for the defendant company."

Defendant's request for instructions No. 4.

"You are charged that if all the evidence and testimony adduced by the plaintiff and all the evidence and testimony adduced by the defendant company has the effect of leaving you in doubt as to the negligence of the defendant company, then plaintiff has not proven negligence on the part of the defendant company and your verdict must be for the defendant."

Defendant's Request for Instructions No. 5.

"Gentlemen of the Jury:

"You are charged gramamen or gist of the case which you have been trying as jurors is the negligence or non-negligence of the defendant company, and if you are not satisfied in your minds that the defendant company was guilty of negligence then your verdict must be for the defendant company."

The Court declined to give the instructions requested, to which ruling of the Court the defendant then and there in open Court excepted.

Thereupon the Court read the following charge to the Jury:

41 Page 1:

"Gentlemen of the Jury:

This is an action brought by James Rock against the defendant, the Panama Railroad Company, for damages for the alleged wrongful death of the plaintiff's wife as a result of the negligence of the defendant. The plaintiff alleges in his complaint that he is a resident of Gatun, Canal Zone, and is the only surviving heir at law of Rachael Rock, plaintiff's deceased wife, and plaintiff brings this action for himself and in his capacity as heir of the said Rachael Rock, deceased, and that the defendant is a corporation, organized and existing under and by virtue of the laws of the State of New York, United States of America, is a common carrier by railroad within the Canal Zone, and at all times hereinafter mentioned defendant was such common carrier of persons and property for hire, and was such common carrier and was operating said railroad on the 20th day of May, 1918.

"Plaintiff further alleges that on the 20th day of May, 1918, and a long time prior thereto, he was the lawful husband of Rachael Rock, deceased, and living with his said wife in the town of Gatun, and that he is the legal heir and her only surviving heir at law.

"That on the 20th day of May, 1918, said Rachael Rock, for the usual customary cash consideration which was then and there paid by the said plaintiff's decedent unto the defendant, she purchased from the defendant a certain railroad ticket, by the terms of which defendant promised and agreed to undertake to safely carry plaintiff's decedent as passenger in a second class coach or car of

Page 2:

one of the defendant's passenger trains, from the city of Panama, Republic of Panama, through and across the Canal Zone to the town of Gatun, Canal Zone, * * etc., and that plaintiff's said decedent did then and there go aboard and enter said second-class coach or car of said defendant's train and become a passenger thereon, etc.

"That while plaintiff's decedent was such passenger, the defendant and its servants and employees so negligently conducted itself and themselves in the operation and management of said train of cars, and in having its tracks so unskillfully and improperly constructed, etc., as to cause the derailment of said train of cars at or near a place known as Gamboa, in the Canal Zone, and that the coach or car wherein said plaintiff's decedent was riding as a passenger, was suddenly and violently thrown from the tracks while said train was being operated by the defendant at a great and dangerous rate of speed upon a down grade and at a curve, and that said car was overthrown and whereby said Rachael Rock, plaintiff's decedent, received great and severe bodily injuries from which she suffered great and severe bodily, physical pain and

mental anguish, and from which said injuries, received as aforesaid, died on the said 20th day of May, 1918, etc., and plaintiff suffered damages in the sum of fifteen thousand dollars ($15,000.00), for which he prays judgment.

"To this complaint the defendant has filed its general denial. The burden of proof in this case is on the plaintiff, and unless you are reasonably satisfied by preponderance of the evidence that the plaintiff is entitled to recover, you must find for the defendant.

"The plaintiff can only recover when he has satisfied you by a preponderance of the evidence that his wife's death was the result of the negligence of the defendant company, and even if you should find the defendant company was negligent in the manner in which it was operating its train at the time and at the point of accident, yet if the plaintiff's decedent herself was negligent and her negligence contributed to her death then the plaintiff is not entitled to recover, notwithstanding the negligence of the defendant, or if the accident was sustained because they were mutually negligent, plaintiff cannot recover.

Page 3:

"The Court instructs the jury that negligence, whether on the part of the defendant or plaintiff's decedent may be briefly defined to be the doing or failing to do of some act or thing which, under the circumstances, it is the duty of the party to do or to leave undone; or, in other words, negligence is a failure to exercise that degree of care and diligence that an ordinarily prudent person would exercise in his own affairs under like or similar circumstances. That is, negligence is the want or omission of reasonable care and diligence, the failure to do something which a reasonable person, guided by those considerations which ordinarily regulate the conduct of human af-

fairs under the circumstances, would do, or the doing of something which such person under such circumstances would not do. And it may be further defined to be a failure to observe, for the protection of the interests of another person, that degree of care, precaution and vigilance, which the circumstances justly demanded,
42 whereby such other person suffers injury.

Page 4:

"The Court instructs the jury that "contributory negligence" is such negligence on the part of plaintiff's decedent as helped to produce the death complained of, and if the jury find, from a preponderance of all the evidence in this case, that plaintiff's decedent was guilty of any negligence that helped to bring about or produce the death complained of, then in that case, the plaintiff cannot recover in this action; or, in other words, "contributory negligence means a failure upon the part of the plaintiff's decedent, if she did so fail, to observe care for her own safety, and by reason of such failure she helped to cause or bring about her death, and when but for such failure she would not have been killed.

Page 5:

"Under the rule of respondeat superior, a corporation is civilly liable for torts committed by its agent or servant while acting within the scope of its employment, although the corporation neither authorized the doing of the particular act, or ratified it after it was done. The modern law is, that whenever the agent of a corporation, proceeding within the general scope of its powers and of the power delegated by it to him, commits a wrong, the corporation must pay damages to the person injured, just as a natural person would be compelled to do under like circumstances. And the corporation is also liable for the

negligence of its agents or servants resulting in the failure to perform duties imposed upon it for consequent injury to one to whom such duties are owing, even though the servants were carefully selected with reference to their competency. The employer's duty is not fully discharged in such a case when he exercises care in the selection of employees, although it was his duty to exercise such care, but he is liable for not seeing to it that his employees perform their duties with reasonable care, skill and diligence.

Page 6:

"The law exacts of a railway company engaged in carrying passengers the highest practicable care for the safety of its passengers in the operation of its trains. And if you are convinced by the evidence in this case that the plaintiff's decedent was a passenger on defendant's train, and was violently thrown from her seat in the coach and killed by reason of the train on which she was riding being derailed, and if you further find that no explanation thereof is made by the defendant at the trial of this case, the defendant's negligence and the decedent's freedom from contributory negligence are established. But if the defendant has made explanation satisfactory to you, and you are convinced from the evidence in the case that the defendant was not negligent, or that the plaintiff's decedent was guilty of contributory negligence, then in such case your verdict would be for the defendant.

Page 7:

"The Court instructs the jury that the proximate cause of an event is that which in a natural and continuous sequence, unbroken by any new cause, produces the event. The consequences must be the natural and probable con-

sequence, distinguishd from the possible consequences. The natural and probable consequences are those which human foresight can forsee, because they happened so frequently that they may be expected to happen again, and in order to award a finding that negligence is the proximate cause of the injury it should appear that the injury was the natural and probable consequence of the negligence act, and that it ought to have been foreseen,—not necessarily the precise, actual injury, but some like injury likely to result therefrom.

Page 8:

"If the jury are reasonably satisfied from the evidence that the plaintiff's decedent on the 20th day of May, 1918, purchased from the defendant a railroad ticket by the terms of which the defendant company promised and agreed to and with the plaintiff's decedent in consideration of the payment unto defendant of the purchase price of said ticket, to safely carry plaintiff's said wife, Rachael Rock, as passenger on a second-class coach or car of one of defendant's regular passenger trains from the City of Panama to and across the Canal Zone to the city or town of Gatun, Canal Zone, and plaintiff's decedent duly tendered and presented said ticket to the said defendant, and defendant received said ticket and permitted and invited plaintiff's decedent aboard a second-class coach or car of the defendant's passenger train, to be car-
43 ried as a passenger from the city of Panama aforesaid to the said city or town of Gatun, and that the said Rachael Rock, did go aboard and enter said coach or car of defendant and was such passenger on defendant's train, and while riding to said city or town of Gatun the train of cars, or some of the cars thereof, ran off the track and plaintiff's said wife was killed thereby, then the plaintiff makes out a prima facia case for re-

covery, and is entitled to recover, unless the defendant reasonably overcomes the prima facia right of recovery by the evidence in the case.

Page 9:

"Evidence has been introduced tending to show that the defendant's railroad track at and along and near the point of the accident was at the time of the accident in first-class condition, including the road bed, the ties, the rails and the binding of the rails together, and the attachments of the rails to the ties. There is also evidence tending to show that the railroad train, consisting of the engine and all of the cars, had been inspected immediately before the train started from the city of Panama, and was in first-class condition, and that the air had been tested and found working and in perfect order, and there is no evidence to show that any injury or defect to any of the cars in the, train had occurred between Panama and the point of the accident. Evidence was also introduced showing that the train had within it a refrigerator car filled with beef to its fullest capacity, and that this car was ahead of the passenger coaches and this car was first-class in every respect, including the trucks and wheels, and flanges, and that it was the first car to leave the track, and as the result of its leaving the track the cars in the rear, in one of which the plaintiff's decedent was seated, were wrecked, causing her death. If you believe from the evidence that the roadbed at, along and near the point of the accident, and the rails and ties and the connections and fastenings of the ties together, and on the ties, were all in first-class, good condition at and prior to the time of the accident, and if you further believe from the evidence that the locomotive and cars being pulled by the

locomotive at the time of the accident were all in first-class condition and no defects in the same, so far as proper care and inspection of such cars would reveal, and that the defendant had used every ordinary care and prudence in inspecting the car and track, and that no defect in either could be discovered, then so far as these two matters are concerned it would be your duty to find for the defendant.

Page 10:

"As part of the evidence which you are to consider is a stipulation, or agreement, made by the parties hereto, and which is made a part of the record evidence in this case, which is as follows:

'1. That defendant is a New York corporation and is operating and doing business within the Canal Zone, and is within the jurisdiction of this Court;

2. That two certain cold storage cars and all the second-class passenger coaches in a train belonging to and at that time operated by and under the control of defendant company were derailed and wrecked at or near Gamboa, Canal Zone, on date of May 20, 1918, but that neither the engine, the cold storage car attached to the engine, nor any of the first class coaches in the train were wrecked, damaged, or injured, nor was the track at the scene of the accident torn up, displaced or broken thereby, but on the contrary was and remained in good and proper condition before as well as after said accident, and up to the present time had not needed repairs of any kind as a result of said accident. The defendant does not admit, but expressly denies that said derailment and wreck were due to any negligence or want of care upon the part of defendant company;

3. That Rachel Rock, wife of the plaintiff, was a passenger in one of the second class coaches mentioned in the foregoing paragraph and that by the derailment and wrecking of certain of said second class passenger coaches in said train she received bodily injuries which caused her death on said 20ht day of May, 1918.'

44 Page 11:

"If the plaintiff's decedent, his wife, was a passenger upon defendant's road in one of defendant's coaches as charged in his complaint, the defendant's obligation was to carry said decedent safely and properly; and if the defendant entrusted this duty to the servants of the Company, the law holds the defendant responsible for the manner in which they executed it. The carrier is obliged to protect its passengers from improper and unnecessary violence at the hands of its own servants. And the established law is that a carrier is responsible for the negligence and wrongful conduct of its servants suffered or done in the line of their employment whereby a passenger is injured. The carrier is not an insurer of its passenger's safety against every possible source of danger, but is bound to use all such reasonable precaution as human judgment and foresight are capable of to make its passengers' journey safe and comfortable. This degree of care is required and applied not only to the manner in which the train was being run by the engineer and trainmen, but also to the running gear and equipment of the engine, tenders, and cars, and the way in which its roadbed was constructed, and its ties and rails laid and maintained; and if you believe from the evidence that the defendant failed to exercise such care in any of these particulars, and such failure caused the derailment resulting in the death of plaintiff's decedent, your verdict

must be for the plaintiff, but if on the contrary, you believe from the evidence that the defendant had exercised such care then you must find for the defendant. If you believe from the evidence that defendant's train of cars in which plaintiff's decedent was being carried as passenger on the 20th day of May, 1918, was thrown from the track causing the death of plaintiff's decedent as alleged in his complaint, and the cause of such action is one in which the highest degree of practical care, skill and caution consistent with operating the road, the defendant could not have provided against, and the said train was not thrown from the track because of the mode and construction and repair of said track or by excessive speed and not because of any fault or neglect whatever of the defendant, its agents or servants, then the jury should find for the defendant as to the injuries to the person of plaintiff's decedent in the petition complained of. But, if the jury find from the evidence the railroad track where said accident occurred was unsafe and in dangerous condition that might have been remedied or guarded against by the exercise by the defendant's employees of the

Page 12:

highest degree of care and skill then practical and then known on track repairs, and that such unsafe and dangerous condition of said railroad track also contributed to said condition, the law is for the plaintiff, and he is entitled to compensatory damages, but he can only recover such damages, if any, as flow from and are the immediate results of the injury alleged in the complaint. Damage produced by other agencies than those causing the alleged injury, or even any agencies remotely connected

with those causing the injury, cannot be awarded as proximate or proper compensation.

Page 13:

Gentlemen of the Jury: As to the speed of the train, there is no law fixing the speed that a train may be operated by a railroad company. A high rate of speed of a railway train will not of itself establish or prove negligence of the railway company. Railway companies may run their cars at such speed as under all the circumstances will comport with the rule of law which requires them to exercise the utmost care and foresight for the safety of their passengers, as herein explained.

"And whether a given rate of speed comports with the rule depends on the circumstances, such as the condition and curvature of the track, the grade of the track, the number of cars in a train and the arrangement and location of cars of different character of construction, if any, the weight of the train, the roadbed, ties, rails, fastening of the rails together, the fastening of the rails to the ties, the condition of the locomotive and condition of the cars pulled by the locomotive at that time and place, the contents of the cars, and all other conditions which may appear from the evidence and which may seem to you to be of importance in determining what speed would be negligence; the danger, if any, to passengers occupying any and all seats where passengers are accustomed and permitted to ride and being thrown from the car by the movement thereof, and all the facts and circumstances surrounding the particular time and place in question, as you find the same to be shown by the evidence introduced upon the trial.

Page 14:

"The Court instructs the jury that it is the undisputed evidence in this case that the plaintiff's wife was a passenger on defendant's car at the time and place complained of by plaintiff; the defendant having received plaintiff's wife upon board of such train, the due obligation of the defendant to plaintiff's wife was to use the highest degree of care practical and known among prudent, skillful and experienced men in that kind of business, to carry her safely, and a failure of the defendant (if you believe there was a failure) to use such highest degree of care would constitute negligence on its part, and defendant would be responsible for all injuries resulting to plaintiff and plaintiff's wife, if any, from such negligence, if any; and it is undisputed evidence in this case that the car in which plaintiff's wife was riding together with other cars in said train operated by the defendant at the time and place alleged was derailed, and the plaintiff's wife was killed as a result of such derailment of the car in which she was riding. The presumption is that it was occasioned by some negligence of dedefendant, and the burden of proof is cast upon the defendant to rebut this presumption of negligence and establish the fact that there was no negligence on its part, and that the injury and death of the plaintiff's wife was occasioned by an inevitable accident, or by some cause which such highest degree of care would not have avoided.

Page 15:

"The Court instructs the jury that plaintiff can only recover such damages, if any, as flow from and are the immediate result of the injury alleged in the complaint. Damages produced by other agencies than those causing the alleged injury, or even any agencies remotely con-

nected with those causing the injury, cannot be awarded as proximate or proper compensation. Where speculation or conjecture has to be resorted to for the purpose of determining whether the alleged injury resulted from wrongful act or from some other cause, then the rule of law excludes the allowance of damages for such injury.

Page 16:

"The Court instructs the jury that if you believe that the deceased, the wife of the plaintiff, met her death through the wrongful act of the defendant as charged in the complaint, in assessing damages, while you must assess with reference to pecuniary injuries sustained by the plaintiff in consequence of the death of his wife, you are not limited to loss actually sustained at the precise period of her death, but may include all prospective loss provided they are such as the jury believe from the evidence will actually result to the plaintiff as proximate damages arising from the death of his wife. And in determining the damages sustained by the husband you have the right to take into consideration the pecuniary loss, if any, sustained by him in being deprived of the services of his wife.

"It is difficult to adduce direct evidence of the exact pecuniary loss occasioned the plaintiff by the death of his wife, or to show the exact value of her services, and you are committed to determine the question of damages from your own observation, experience, and knowledge conscientiously applied to the facts and circumstances of the case which have been detailed to you by the witnesses in the trial of this case. The age of plaintiff's wife, the health she enjoyed, the money, if any, she was making by her labor, and her habits are data from which you may argue how long she would probably live and work,

and what her life would be worth to the husband in its pecuniary value. And in assessing damages sustained by the plaintiff you should allow such pecuniary damages which were the direct result of the death of his said wife.

"The measure of damages in this case is the present value of the amount of money which the plaintiff, during the continuance of said wife's life, would have received from her had she lived. The present value of a sum of money payable in the future is what that sum is worth if paid presently,—paid now. For example, the present value of $1.00 at 6% at the end of one
46 year is found by dividing $1.00 by $1.06; and the present value of $1.00 at the end of two years is found by dividing $1.00 by $1.12;—which process you may follow throughout your calculation, if you desire, but are not required to follow this precise method. Having, from the evidence, fixed as accurately and as fair as you possibly can, the number of dollars representing the yearly earnings of deceased, from all the evidence, her expectancy, (that is, the number of years which she would probably have lived) you could by multiplying one of these numbers by the other determine approximately what would have been the gross amount of her earnings of her whole life time, that is from the time of her death. This gross amount, when ascertained, would, of course, have to be reduced to its present value; that is to an amount which, paid

Page 17:

down, would be the just and legal cash equivalent of such gross amount. The present value would necessarily be less than the gross amount,—the longer the life the greater would be the difference in these respective sums. If you pursue the course indicated and arrive at the gross amount in the manner

which has just been explained to you it will then be incumbent upon you to make the necessary calculation for ascertaining its present cash value, and you can do this in the manner pointed out in this instruction, or by any other proper and legal method.

Page 18:

You are the judges of the credibility of the witnesses and the weight to be given to their testimony. You should reconcile the evidence in this cause upon the theory that each and every witness is telling the truth if it can be reasonably done. You should not disregard the testimony of any witness without due consideration and without just cause. If you find such conflict in the testimony of the witnesses that you cannot reconcile their testimony, then it is your province to choose whom you will believe and whom you will not believe. And, in determining what evidence you will receive and what you will reject, you may take into consideration the interest, if any, that any witness has in the result of this trial; their manner and appearance upon the witness stand, and the probability or improbability of their testimony; their apparent candor or apparent lack of candor, and their intelligence or lack of intelligence while testifying; their opportunities to know and understand the things about which they have testified; their relation to each other; their relationship, if any, to the parties; and such other considerations as appear to you from the witness stand in arriving at the truthfulness of each and every witness.

Page 19:

"Gentlemen of the Jury: the evidence in this case now having been introduced and the argument of counsel heard, and the instructions of the Court given, there con-

fronts you the final and important duty of considering the evidence, argument of counsel, and the instructions of the Court and find a fair and impartial verdict.

"I submit this case to you with the confidence that you will faithfully discharge the duty resting upon you as jurors in this case, and will render a fair and impartial verdict under the law and the evidence. As manly upright men, charged with the responsible duty of assisting the Court in the administration of justice, you will put aside all sympathy and sentiment, all consideration of public approval or disapproval, and look steadfastly and alone to the law and the evidence in the case, and return into Court such verdict as is warranted thereby.

Page 20:

"When you retire to the jury room to deliberate on your verdict you will first select one of your number as foreman.

"If you find for the plaintiff you will then proceed to find and ascertain the amount of his dam-
47 ages, and write the same in your verdict.

"If you find for the defendant it will not be necessary for you to give any attention or consideration whatever as to damages.

"Forms of verdicts will be furnished you, and when you have agreed upon your verdict you will have the same signed by your foreman, and you will return to the Court room with your verdict.

(Sgd) JOHN W. HANAN,
United States District Judge."

Thereupon the defendant by counsel before the Jury retired, then and there in open Court, noted the following exceptions to the Court's charge:

"1. The defendant Company excepts to that part of the Honorable Court's written charge to the jury which appears on Page 1 and the first half of page 2 thereof, and which reads as follows:

"This is an action brought by James Rock against the defendant, the Panama Railroad Company, for damages for the alleged wrongful death of the plaintiff's wife as a result of the negligence of the defendant. The plaintiff alleges in his complaint that he is a resident of Gatun, Canal Zone, and is the only surviving heir at law of Rachael Rock, plaintiff's deceased wife, and plaintiff brings this action for himself and in his capacity as heir of the said Rachael Rock, deceased, and that the defendant is a corporation, organized and existing under and by virtue of the laws of the State of New York, United States of America, is a common carrier by railroad within the Canal Zone, and at all times hereinafter mentioned defendant was such common carrier of persons and property for hire, and was such common carrier and was operating said railroad on the 20th day of May, 1918.

"Plaintiff further alleges that on the 20th day of May, 1918, and a long time prior thereto, he was the lawful husband of Rachael Rock, deceased, and living with his wife in the town of Gatun, and that he is the legal heir and her only surviving heir at law.

"That on the 20th day of May, 1918, said Rachael Rock, for the usual customary cash consideration which was then and there paid by the said plaintiff's decedent unto the defendant, she purchased from the defendant a certain railroad ticket, by the terms of which defendant promised and agreed to undertake to safely carry plaintiff's decedent as passenger in a second-class coach or car of one of the defendant's passenger trains, from the city of Panama, Republic of Panama, through and across the

Canal Zone to the town of Gatun, Canal Zone, * * etc., and that plaintiff's said decedent did then and there go aboard and enter said second-class coach or car of said defendant's train and become a passenger thereon, etc.

"That while plaintiff's decedent was such passenger, the defendant and its servants and employees so negligently conducted itself and themselves in the operation and management of said train of cars, and in having its tracks so unskillfully and improperly constructed, etc., as to cause the derailment of said train of cars at or near a place known as Gamboa, in the Canal Zone, and that the coach or car wherein said plaintiff's decedent was riding as a passenger, was suddenly and violently thrown from the tracks while said train was being operated by the defendant at a great and dangerous rate of speed upon a down grade and at a curve, and that said car was overthrown and whereby said Rachael Rock, plaintiff's decedent, received great and severe bodily injuries from which she suffered great and severe bodily, physical pain and mental anguish, and from which said injuries, received as aforesaid, died on the said 20th day of May, 1918, etc., and plaintiff suffered damages in the sum of fifteen thousand dollars ($15,000.00), for which he prays judgment."

for the reason that said part of the charge is a quotation of plaintiff's complaint, couched in technical legal terms, the effect and meaning of all of which was not explained to the jury by the Honorable Court who were therefore misled and confused thereby with the result that defendant Company's interests were prejudiced.

"2. Defendant Company excepts to that part of the Honorable Court's written charge to the jury appearing in the second paragraph of page two thereof,
48 which reads as follows:

'To this complaint the defendant has filed its general denial. The burden of proof in this case is on the plaintiff, and unless you are reasonably satisfied by preponderance of the evidence that the plaintiff is entitled to recover, you must find for the defendant.'

for the reason that the Court therein used the technical legal phases: 'general denial' and 'preponderance of the evidence', without accompanying the use of said phrases with an explanation of the meaning and effect of said terms, wherefore the jury was misled and confused and the defendant Company prejudiced.

"3. Defendant excepts to that part of the Honorable Court's written charge appearing in the third paragraph, on page two thereof, which reads as follows:

'The plaintiff can only recover when he has satisfied you by a preponderance of the evidence that his wife's death was the result of the negligence of the defendant company, and even if you should find the defendant company was negligent in the manner in which it was operating its train at the time and at the point of accident, yet if the plaintiff's decedent herself was negligent and her negligence contributed to her death then the plaintiff is not entitled to recover, notwithstanding the negligence of the defendant, or if the accident was sustained because they were mutually negligent, plaintiff cannot recover.'

for the reason that therein the jury is charged that in the event they find against defendant on the issue of negligence they might then find for the plaintiff, which was an erroneous statement of law, for the reason that under the laws of the Canal Zone the right of action

for damages for death by wrongful act does not survive nor entitle decedent's next kin or heir at law to bring an action for damages; furthermore, in the part of the charge referred to there is injected the doctrine of contributory negligence which was not an issue raised by any of the evidence adduced during the trial of the cause, all of which tended to mislead and confuse the jury and was therefore, prejudicial to the rights and interests of defendant.

"4. Defendant excepts to that part of the Honorable Court's written charge to the jury appearing on page three thereof, which reads as follows:

'The Court instructs the jury that negligence, whether on the part of the defendant or plaintiff's decedent may be briefly defined to be the doing or failing to do of some act or thing which, under the circumstances, it is the duty of the party to do or to leave undone; or, in other words, negligence is a failure to exercise that degree of care and diligence that an ordinarily prudent person would exercise in his own affairs under like or similar circumstances. That is, negligence is the want or omission of reasonable care and diligence, the failure to do something which a reasonable person, guided by those considerations which ordinarily regulate the conduct of human affairs under the circumstances, would do, or the doing of something which such person under such circumstances would not do. And it may be further defined to be a failure to observe, for the protection of the interest of another person, that degree of care, precaution and vigilance, which the circumstances justly demanded, whereby such other person suffers injury.'

for the reason that said part of the charge, in defining the word 'negligence' the Court leaves it to the jury to

find whether or not plaintiff's decedent was negligent and so injects into the issues to be determined by the jury the doctrine of contributory negligence which was not an issue raised by any of the evidence adduced during the trial of the cause, which tended to mislead and confuse the jury and prejudice defendant.

"5. Defendant excepts to that part of the Honorable Court's written charge to the jury appearing on page four thereof, which reads as follows:

'The Court instructs the jury that 'contributory negligence' is such negligence on the part of plaintiff's decedent as helped to produce the death complained of, and if the jury find, from a preponderance of all the evidence in this case, that plaintiff's decedent was guilty of negligence that helped to bring about or produce the death complained of, then in that case, the plaintiff cannot recover in this action; or, in other words, "contributory negligence means a failure upon the part of the plaintiff's decedent, if she did so fail, to observe care for her own safety, and by reason of such failure she helped
to cause or bring about her death, and when but
49 for such failure she would not have been killed.'

wherein the Court defines the meaning of the term, "contributory negligence" on the ground that the issue of contributory negligence was not raised by any of the evidence or testimony adduced during the trial, which charge, therefore, misled and confused the jury and prejudiced defendant.

"6. The defendant excepts to that part of the Honorable Court's written charge to the jury appearing on page five thereof, which reads as follows:

'Under the rule of respondeat superior, a corporation is civilly liable for torts committed by its agent or servant while acting within the scope of its employment, although the corporation neither authorized the doing of the particular act, or ratified it after it was done. The modern law is, that whenever the agent of a corporation, proceeding within the general scope of its powers and of the power delegated by it to him, commits a wrong, the corporation must pay damages to the person injured, just as a natural person would be compelled to do under like circumstances. And the corporation is also liable for the negligence of its agents or servants resulting in the failure to perform duties imposed upon it for consequent injury to one to whom such duties are owing, even though the servants were carefully selected with reference to their competency. The employer's duty is not fully discharged in such a case when he exercises care in the selection of employees, although it was his duty to exercise such care, but he is liable for not seeing to it that his employees perform their duties with reasonable care, skill and diligence.'

wherein the Court defines the doctrine of 'respondeat superior,' on the ground that none of the issues raised by the testimony or evidence adduced during the trial involve the doctrine of 'respondeat superior', which charge, therefore, tended to mislead and confuse the jury and prejudice defendant company.

"7. Defendant excepts to that part of the Honorable Court's written charge to the jury appearing on page 6 thereof, which reads as follows:

'The law exacts of a railway company engaged in carrying passengers the highest practicable care for the safety of its passengers in the operation of its trains. And

if you are convinced by the evidence in this case that the plaintiff's decedent was a passenger on defendant's train, and was violently thrown from her seat in the coach and killed by reason of the train on which she was riding being derailed, and if you further find that no explanation thereof is made by the defendant at the trial of this case, the defendant's negligence and the decedent's freedom from contributory negligence are established. But if the defendant has made explanation satisfactory to you, and you are convinced from the evidence in the case that the defendant was not negligent, or that the plaintiff's decedent was guilty of contributory negligence, then in such case your verdict would be for the defendant.'

on the ground that said charge does not correctly state the law of the case to the jury in that it makes it appear to the jury that it is incumbent on the defendant to explain the cause of the wreck in a manner satisfactory to the jury, and that the defendant's negligence and plaintiff's freedom from contributory negligence are established unless the defendant does make a satisfactory explanation of the cause of the wreck to the jury; furthermore, the charge incorrectly states the law in that it is made to appear incumbent on defendant to 'convince' the jury, by what means is not indicated, that defendant company was not negligent; furthermore, the charge injects into the issues to be considered by the jury the matter of decedent's contributory negligence which was not an issue raised by any testimony or evidence adduced during the trial, all of which misled and confused the jury and prejudiced defendant.

50 "8. Defendant excepts to that part of the Honorable Court's written charge appearing on page seven thereof, which reads as follows:

'The Court instructs the jury that the proximate cause of an event is that which in a natural and continuous sequence, unbroken by any new cause, produces the event. The consequences must be the natural and probable consequence, distinguished from the possible consequences. The natural and probable consequences are those which human foresight can foresee, because they happened so frequently that they may be expected to happen again, and in order to award a finding that negligence is the proximate cause of the injury it should appear that the injury was the natural and probable consequence of the negligence act, and that it ought to have been foreseen,—not necessarily the precise, actual injury, but some like injury likely to result therefrom.'

on the ground that the Court defined the words 'proximate cause' and so injected into the issues to be determined by the jury one which was not raised by any evidence or testimony adduced during the trial, and so tended to confuse and mislead the jury and prejudice the defendant.

"9. Defendant excepts to that part of the Honorable Court's written charge to the jury appearing on page eight thereof, which reads as follows:

"If the jury are reasonably satisfied from the evidence that the plaintiff's decedent on the 20th day of May, 1918, purchased from the defendant a railroad ticket by the terms of which the defendant company promised and agreed to and with the plaintiff's decedent in consideration of the payment unto defendant of the purchase price of said ticket, to safely carry plaintiff's said wife, Rachael Rock, as passenger on a second-class coach or car of one of defendant's regular passenger trains from the city of

Panama to and across the Canal Zone to the city of Gatun, Canal Zone, and plaintiff's decedent duly tendered and presented said ticket to the said defendant, and defendant received said ticket and permitted and invited plaintiff's decedent aboard a second-class coach or car of the defendant's passenger train, to be carried as a passenger from the City of Panama aforesaid to the said city or town of Gatun, and that the said Rachael Rock, did go aboard and enter said coach or car of defendant and was such passenger on defendant's train, and while riding to said city or town of Gatun the train of cars, or some of the cars, thereof, ran off the track and plaintiff's said wife was killed thereby, then the plaintiff makes out a prima facia case for recovery, and is entitled to recover, unless the defendant reasonably overcomes this prima facia right of recovery by the evidence in the case.'

on the ground that the part of the charge referred to erroneously leaves it to the jury to find whether or not plaintiff's decedent was a passenger on board the wrecked train, notwithstanding the fact that under and by virtue of the stipulation entered into by and between counsel for the parties it was admitted that plaintiff's decedent was a passenger on said train; the charge is, furthermore, erroneous in that, after making use of the undefined term 'prima facie' and advising the jury that unless the defendant reasonably overcomes plaintiff's prima facie right to recover from defendant, the Court did not state or illustrate by example to the jury what kind of evidence and what weight of evidence would reasonably overcome plaintiff's prima facie right to recover, all of which tended to mislead and confuse the jury and prejudice the defendant.

"10. Defendant excepts to that part of the Honorable Court's written charge to the jury appearing on page nine thereof, which reads as follows:

'Evidence has been introduced tending to show that the defendant's railroad track at and along and near the point of the accident was at the time of the accident in first-class condition, including the road bed, the ties, the rails and the binding of the rails together, and the attachments of the rails to the ties. There is also evidence tending to show that the railroad train, consisting of the engine and all of the cars, had been inspected immediately before the train started from the city of Panama, and was in first-class condition, and that the air had been tested and found working and in perfect order, and there is no evidence to show that any injury
51 or defect to any of the cars in the train had occurred between Panama and the point of the accident. Evidence was also introduced showing that the train had within it a refrigerator car filled with beef to its capacity, and that this car was ahead of the passenger coaches and this car was first-class in every respect, including the trucks and wheels, and flanges, and that it was the first car to leave the track, and as the result of its leaving the track the cars in the rear, in one of which the plaintiff's decedent was seated, were wrecked, causing her death. If you believe from the evidence that the roadbed at, along and near the point of the accident, and the rails and ties and the connections and fastenings of the ties together, and on the ties, were wrecked, causing her death. If you believe from the evidence that the roadbed at, along and near the point of the accident, and the rails and ties, and the connections and fastenings of the ties together, and on the ties, were all in first-class, good condition at and prior to the time

of the accident, and if you further believe from the evidence that the locomotive and cars being pulled by the locomotive at the time of the accident were all in first-class condition and no defects in the same, so far as proper care and inspection of such cars would reveal, and that the defendant had used every ordinary care and prudence in inspecting the car and track, and that no defect in either could be discovered, then so far as these two matters are concerned it would be your duty to find for the defendant.'

wherein the Court leaves it to the jury to determine whether or not the ties, road-bed and tracks at the scene of the accident were in good and proper condition and whether or not the train which was subsequently wrecked was properly inspected prior to commencing the trip, notwithstanding the fact that the stipulation entered into between counsel prior to the trial, and which was read to the jury at the commencement thereof, admitted on plaintiff's part that the tracks, road-bed, ties, etc., at the scene of the accident were at the time thereof in good and proper condition, and notwithstanding the fact that the uncontroverted and uncontradicted testimony adduced at the trial clearly indicated that the train prior to the commencement of the trip was properly inspected, all of which tended to mislead and confuse the jury and prejudice defendant company.

"11. Defendant excepts to that part of the Honorable Court's written instructions to the jury appearing on pages eleven and twelve thereof, which reads as follows:

'If the plaintiff's decedent, his wife, was a passenger upon defendant's road in one of defendant's

coaches as charged in his complaint, the defendant's obligation was to carry said decedent safely and properly; and if the defendant entrusted this duty to the servants of the Company, the law holds the defendant responsible for the manner in which they executed it. The carrier is obliged to protect its passengers from improper and unnecessary violence at the hands of its own servants. And the established law is that a carrier is responsible for the negligence and wrongful conduct of its servants suffered or done in the line of their employment whereby a passenger is injured. The carrier is not an insurer of its passenger's safety against every possible source of danger, but is bound to use all such reasonable precaution as human judgment and foresight are capable of to make its passengers' journey safe and comfortable. This degree of care is required and applied not only to the manner in which the train was being run by the engineer and trainmen, but also to the running gear and equipment of the engine, tenders, and cars, and the way in which its roadbed was constructed, and its ties and rails laid and maintained; and if you believe from the evidence that the defendant failed to exercise such care in any of these particulars, and such failure caused the derailment resulting in the death of plaintiff's decedent, your verdict must be for the plaintiff, but if on the contrary, you believe from the evidence that the defendant had exercised such care then you must find for the defendant. If you

52 believe from the evidence that defendant's train of cars in which plaintiff's decedent was being carried as passenger on the 20th day of May, 1918, was thrown from the track causing the death of plaintiff's decedent as alleged in his complaint, and the cause of such action is one in which the highest degree of practical care, skill and caution consistent with operating the road, the defendant could not have provided

against, and the said train was not thrown from the track because of the mode and construction and repair of said track or by excessive speed and not because of any fault or neglect whatever of the defendant, its agents or servants, then the jury should find for the defendant as to the injuries to the person of plaintiff's decedent in the petition complained of. But, if the jury find from the evidence the railroad track where said accident occurred was unsafe and in dangerous condition that might have been remedied or guarded against by the exercise by the defendant's employees of the highest degree of care and skill then practical and then known on track repairs, and that such unsafe and dangerous condition of said railroad track also contributed to said condition, the law is for the plaintiff, and he is entitled to compensatory damages, but he can only recover such damages, if any, as flow from and are the immediate results of the injury alleged in the complaint. Damage produced by other agencies than those causing the alleged injury, or even any agencies remotely connected with those causing the injury, cannot be awarded as proximate or proper compensation.'

wherein the Court erroneously leaves it to the jury to find whether or not plaintiff's decedent was a passenger on defendant's train and whether or not defendant's track, road-bed, ties, etc., at the scene of the wreck were in good condition, notwithstanding that the stipulation entered into between counsel before the trial and which was read to the jury at the commencement thereof, admitted that plaintiff's decedent was a passenger on the train in question and that the track, ties and road-bed at the scene of the accident were in good and proper condition before and at the time of the wreck; the charge is, furthermore, improper because it contains erroneous

statements of the law in that the jury is instructed that if they determine certain issues in plaintiff's favor, they would then be authorized to assess 'compensatory' damages against defendant in plaintiff's favor, without defining for the benefit of the jury the meaning of the words 'compensatory damages'; furthermore, under the instruction, the jury is authorized to 'find for the defendant as to the injuries to the person of plaintiff's decedent' which injuries to plaintiff's decedent were not one of the elements of damages alleged in plaintiff's complaint and upon which plaintiff based his right of recovery, which charge was erroneous, for the reason that a right of action for damages for death by wrongful act is not authorized under any law of the Canal Zone; nor under the law of the Canal Zone is plaintiff entitled to compensatory or other damages because of loss of plaintiff's decedent's services or loss of her companionship and society; all of which matters misled and confused the jury and prejudiced the rights and interests of defendant company.

"12. Defendant excepts to that part of the Honorable Court's written charge to the Jury appearing on page fourteen thereof, which reads as follows:

"The Court instructs the jury that it is the undisputed evidence in this case that the plaintiff's wife was a passenger on defendant's car at the time and place complained of by plaintiff; the defendant having received plaintiff's wife upon board of such train, the due obligation of the defendant to plaintiff's wife was to use the highest degree of care practical and known among prudent, skillful and experienced men in that kind of business, to carry her safely, and a failure of the defendant (if you believe there was a failure) to use such highest

degree of care would constitute negligence on its part, and defendant would be responsible for all injuries resulting to plaintiff and plaintiff's wife, if any, from such negligence, if any; and it is undisputed evidence in this case that the car in which plantiff's wife was riding together with other cars in said train operated by the defendant at the time and place alleged was derailed, and the plaintiff's wife was killed as a result of such derailment of the car in which she was riding. The presumption is that it was occasioned by some negligence of dedefendant, and the burden of proof is cast upon the defendant to rebut this presumption of negligence
53 and establish the fact that there was no negligence on its part, and that the injury and death of the plaintiff's wife was occasioned by an inevitable accident, or by some cause which such highest degree of care would not have avoided.'

wherein the jury is instructed that if they resolve certain issues in plaintiff's favor, defendant would then 'be responsible for all injuries resulting to plaintiff and plaintiff's wife', on the ground that thereby the jury is authorized to find damages in plaintiff's favor for such injuries as plaintiff's deceased wife sustained which was not one of the elements of damages set out in plaintiff's complaint and upon which plaintiff based his right of recovery of damages; furthermore, the said charge authorized the jury to assess damages in plaintiff's favor 'for all injuries resulting to plaintiff' without attempting in said charge to limit the jury to the elements of damages relied upon in plaintiff's complaint; the said charge was, furthermore, an incorrect statement of law, in that it authorized a recovery by plaintiff of damages against defendant, for the reason that under the laws of the Canal Zone, a next of kin or heir at law

of a deceased person is not authorized to maintain an action for damages arising out of the death by wrongful act of decedent, nor is he authorized under the laws of the Canal Zone to bring and maintain an action for damages for any pecuniary loss or solatium for loss of companionship and society of a deceased wife.

The part of the charge here specified is furthermore, excepted to for the reason that the Court makes use of the highly technical expressions 'burden of proof,' 'presumption of negligence', and inevitable accident', without defining said expressions in simple and understandable language for the benefit of the jury; all of which misled and confused the jury and prejudiced the rights of the defendant.

"13. Defendant excepts to that part of the Honorable Court's written charge to the jury appearing on pages sixteen and seventeen thereof, which reads as follows:

"The Court instructs the jury that if you believe that the deceased, the wife of the plaintiff, met her death through the wrongful act of the defendant as charged in the complaint, in assessing damages, while you must assess with reference to pecuniary injuries sustained by the plaintiff in consequence of the death of his wife, you are not limited to loss actually sustained at the precise period of her death, but may include all prospective loss provided they are such as the jury believe from the evidence will actually result to the plaintiff as proximate damages arising from the death of his wife. And in determining the damages sustained by the husband you have the right to take into consideration the pecuniary loss, if any, sustained by him in being deprived of the services of his wife.

"It is difficult to adduce direct evidence of the exact pecuniary loss occasioned the plaintiff by the death of his wife, or to show the exact value of her services, and you are committed to determine the question of damages from your own observation, experience, and knowledge conscientiously applied to the facts and circumstances of the case which have been detailed to you by the witnesses in the trial of this case. The age of plaintiff's wife, the health she enjoyed, the money, if any, she was making by her labor, and her habits are data from which you may argue how long she would probably live and work, and what her life would be worth to the husband in its pecuniary value. And in assessing damages sustained by the plaintiff you should allow such pecuniary damages which were the direct result of the death of his said wife.

"The measure of damages in this case is the present value of the amount of money which the plaintiff, during the continuance of said wife's life, would have received from her had she lived. The present value of a sum of money payable in the future is what that sum is worth if paid presently,—paid now. For example, the present value of $1.00 at 6% at the end of one
54 year is found by dividing $1.00 by $1.06; and the present value of $1.00 at the end of two years is found by dividing $1.00 by $1.12;—which process you may follow throughout your calculation, if you desire, but are not required to follow this precise method. Having, from the evidence, fixed as accurately and as fair as you possibly can, the number of dollars representing the yearly earnings of deceased, from all the evidence, her expectancy, (that is, the number of years which she would probably have lived) you could by multiplying one of these numbers by the other determine approximately what would have been the gross amount of her earnings

of her whole life time, that is from the time of her death. This gross amount, when ascertained, would, of course, have to be reduced to its present value; that is to an amount which, paid down, would be the just and legal cash equivalent of such gross amount. The present value would necessarily be less than the gross amount, —the longer the life the greater would be the difference in these respective sums. If you pursue the course indicated and arrive at the gross amount in the manner which has just been explained to you it will then be incumbent upon you to make the necessary calculation for ascertaining its present cash value, and you can do this in the manner pointed out in this instruction, or by any other proper and legal method.'

wherein the jury is authorized to assess damages against defendant in plaintiff's favor and wherein the jury is instructed that they are entitled to consider the present and future pecuniary loss occasioned plaintiff by the death of his wife, as elements of damages in the case, on the ground that said instruction is not a correct statement of the law of the case, for the reason that there is no law in force and effect within the Canal Zone authorizing the next kin or heir at law to bring and maintain an action for damages arising out of the death by wrongful act of his decedent, and there is no law of the Canal Zone authorizing the next kin or heir at law to recover damages for his own pecuniary loss because of the death of his decedent."

There were no exceptions saved to the Court's charge by plaintiff.

Thereupon the jury retired to deliberate upon their verdict, and thereafter in open Court returned the following verdict:

"We the jury find for the plaintiff and fix his damages at $3000.00.

H. J. WHITE, Foreman."

to which verdict the defendant then and there in open Court excepted.

Thereafter, to-wit: on May 29, 1920, defendant Company by counsel in open Court filed its motion for a new trial, which motion for a new trial reads as follows:

"Comes now the defendant company in the above styled and numbered cause by its attorneys, Frank Feuille and Walter F. Van Dame, and moves the Honorable Court to set aside the verdict of the jury and to grant a new trial for the following reasons:

1. The Court erred in overruling defendant company's demurrer to plaintiff's complaint.

2. The Court erred in overruling defendant company's motion to cause plaintiff to deposit security for defendant company's costs which motion was based on the provisions of the Executive Order of January 9, 1920.

3. The Court erred in overruling defendant Company's request to instruct the jury to find for defendant at the close of all the testimony for both parties.

4. The Court erred in refusing each of defendant's written charges to the jury numbered 1, 2, 3, 4 and 5.

55 5. The Court erred in allowing the introduction of and exclusion of certain evidence and testimony during the course of the trial, excepted to at the time by defendant.

6. The Court erred in addressing certain remarks to counsel for defendant during the course of trial and in the presence of the jury, excepted to at the time by defendant.

7. The Court erred in certain particulars of its general charge to the jury, excepted to by defendant at the time.

8. The verdict is contrary to law and the weight of the evidence.

9. The verdict is excessive."

Thereafter on June 22, 1920, defendant Company's said motion for new trial was overruled and defendant's exception to said ruling was then and there in open Court noted; a final judgment in accordance with the jury's verdict was thereupon on order of the Court entered in plaintiff's favor against defendant, exception thereto being then and there saved by counsel for defendant Company; and the defendant Company was thereupon allowed thirty days within which to file herein bill of exceptions in this cause, as is all shown by the minutes of the said day entered in this cause, and which minutes read as follows:

"June 22, 1920:

The parties hereto are this day present in Court by counsel, and the motion for a new trial filed therein by said defendant being this day called, the Court, after considering the said motion and being fully advised in the premises, overrules the same and the defendant's exception is noted to the said ruling of the Court; and thereupon it is ordered and adjudged by the Court that

said plaintiff, James Rock, do have and recover of and from the Panama Railroad Company, a Corporation, defendant herein, the sum of three thousand dollars ($3,000.00), his damages in form as heretofore herein by the jury assessed, with interest thereon at the rate of six per centum per annum, together with his lawful costs and charges in this behalf expended. To this judgment of the Court and said defendant excepts and gives notice of its intention to sue out its writ of error, and is, on motion, given thirty days within which to file its bill of exceptions. The plaintiff objects to granting of thirty days time for the filing of said bill of exceptions on the ground that it is contrary to the provisions of Sec. 136 of the Code of Civil Procedure of the Canal Zone."

Premises considered defendant through its counsel now here respectfully tenders the foregoing statement of the evidence adduced by the parties at the trial of this cause, and its bill of exceptions for the Court's allowance and prays that the same be filed among the papers of this cause and be a part of the record thereof.

Submitted, July 20th, 1920.

FRANK FEUILLE,
WALTER F. VAN DAME,
Attorneys for the Panama Railroad Company, a Corporation, Defendant.

56 Examined and approved this 21st day of July, 1920.

JOHN W. HANAN,
United States District Judge for the Canal Zone.

Seal of the District Court, Canal Zone.

Attest:

F. H. SHEIBLEY,
Acting Clerk of said Court.

The foregoing bill of exceptions, set forth the entire proceedings at the trial, settled by agreement of counsel for the parties to the cause, with the request that the same be filed and made a part of the record in the case, on this 20th day of July, A. D. nineteen hundred and twenty.

TODD AND MacINTYRE,
Counsel for Plaintiff.
FRANK FEUILLE and
WALTER F. VAN DAME,
Counsel for Defendant Company.

Filed July 21st, 1920, in the Office of the Clerk of the District Court, Canal Zone.

F. H. SHIEBLEY,
Acting Clerk.

56½ United States of America,
Canal Zone, ss:

I, F. H. Shiebley, Acting Clerk of the United States District Court for the Canal Zone, do hereby certify that the Honorable John W. Hanan, Judge of the said Court, left the Canal Zone on June 29th, 1920, on a vacation to be spent in the United States, and which vacation was to be of the duration of three months, more or less, from said date; and that the said John W. Hanan has not as yet returned to the Canal Zone;

I further certify that on the twenty-second day of June, 1920, the said Honorable John W. Hanan, Judge of the United States District Court for the Canal Zone,

ordered the entry of final judgment in the cause styled and numbered "James Rock vs. Panama Railroad Company, Civil No. 310," and on said date also allowed the defendant company in said cause thirty days within which to prepare, have allowed, and file their bill of exceptions in the said cause; that in view of the fact that the said Judge would be absent from the Isthmus at the end of the time allowed for the preparation, allowance, and filing of the aforementioned bill of exceptions, he gave verbal directions to me, the then Acting Clerk of the Court, to the following effect:

That in the event that counsel for the respective parties in the aforementioned cause settled the bill of exceptions in said cause by agreement, evidenced in writing, on or before the expiration of the said thirty days, allowed for the preparation, allowance, and filing of said bill of exceptions, and presented said bill of exceptions to me, the then Acting Clerk of the Court within said time, then I, as Acting Clerk of the Court, was to indicate the examination and approval of the bill of exceptions by the said Judge by signing the name of the said Judge in the space therefor provided at the end of the bill of exceptions, in the same manner and as if the said Judge were personally present and did the same;

I further certify that the attorneys for the parties to the aforementioned cause accordingly settled the aforementioned bill of exceptions by agreement, on the 21st day of July, 1920, and that thereafter, on July 21st, 1920, I, as Acting Clerk of the Court, in accordance with the said verbal directions of the said Judge, indicated the examination and approval by the Court of the said bill of exceptions, by affixing the signature of John W. Hanan, United States District Judge for the Canal Zone,

thereto, all in the manner in which such signatures are shown and indicated on the copy of the bill of exceptions incorporated in the herein transcript of record of the said cause on writ of error from the United States Circuit Court of Appeals for the Fifth Circuit to the District Court of the Canal Zone.

Witness my hand and the seal of the District Court of the Canal Zone at the Courthouse in Ancon, Canal Zone, on this thirteenth day of August, A. D. 1920.

F. H. SHEIBLEY,
(Seal) Acting Clerk, U. S. District Court of the Canal Zone.

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57 PETITION FOR WRIT OF ERROR.

United States of America.

In the United States Circuit Court of Appeals for the Fifth Circuit.

James Rock, Plaintiff,
vs.
Panama Railroad Company, a Corporation, Defendant.

Petition for Writ of Error from the United States Circuit Court of Appeals for the Fifth Circuit to the District Court of the Canal Zone.

To the Honorable, R. W. Walker, Circuit Judge, United States Circuit Court of Appeals for the Fifth Circuit:

And now comes the Panama Railroad Company, a Corporation, defendant in the above styled cause, and

represents that on the twenty-second day of June, 1920, a final judgment in the amount of Three Thousand Dollars ($3,000.00) United States Currency, was duly entered by the District Court of the Canal Zone, sitting in the Balboa Division, in a suit at law against the defendant Company, wherein James Rock was plaintiff and the Panama Railroad Company, a corporation, was defendant, and awarding costs in favor of plaintiff.

That this is an action for death by wrongful act of plaintiff's decedent, Rachel Rock, wife of Plaintiff, who at the date of her death, May 20, 1918, in a wreck of one of defendant company's trains at Gamboa, Canal Zone, was of the age of 39 years. Plaintiff brings the action as the sole surviving heir at law of his decedent, and alleges as his elements of damages loss of the services of his deceased wife, and his deprivation of the companionship and society of the said deceased wife.

And your petitioner avers that in the defendant Company's answer to the complaint it was set out that without in any manner waiving its pleas, exceptions and demurrers theretofore filed, the defendant Company denied each and every allegation, generally and specially, contained in said plaintiff's complaint, which denial was based on the fact that there is in effect within the Canal Zone no statute authorizing such an action as that brought by plaintiff.

And your petitioner further avers that in the aforementioned judgment and proceedings certain errors were committed to the prejudice of your petitioner, all of which will more fully appear from the assignment of errors which is filed herewith.

Wherefore your petitioner prays that a writ of error from the United States Circuit Court of Appeals for the Fifth Circuit may issue in this case to the District Court of the Canal Zone, for the correction of errors so

complained of, and that a transcript of record, proceedings and papers in this cause, duly authenticated by Clerk of the District Court of the Canal Zone may be sent to the United States Circuit Court of Appeals for the Fifth Circuit as provided by law.

Dated this 13th day of July, 1920.

FRANK FEUILLE,
WALTER F. VAN DAME,
Attorneys for the Panama Railroad Company, a Corporation, Petitioner and Plaintiff in Error.

U. S. Circuit Court of Appeals. Filed July 16th, 1920. Frank H. Mortimer, Clerk.

ASSIGNMENT OF ERRORS.

United States of America.

In the United States Circuit Court of Appeals for the Fifth Circuit.

58 James Rock, Plaintiff,
vs.
Panama Railroad Company, a Corporation, Defendant.

Assignment of Errors.

Now comes the Panama Railroad Company, a corporation, defendant in the above styled cause by its attorneys, Frank Feuille and Walter F. Van Dame, and submits the following assignments of error upon which it will rely in the prosecution of the writ of error in this cause:

I.

The Court erred in overruling defendant company's demurrer to plaintiff's complaint, and to which ruling defendant company duly excepted.

II.

The Court erred in overruling defendant Company's motion for a directed verdict in its favor at the conclusion of plaintiff's case, which motion was based on the following grounds:

(1). The evidence fails to show that the death of Rachael Rock was due to the negligence of the defendant company;

(2). Plaintiff's cause of action is one which does not survive under the laws of the Canal Zone;

(3). The evidence fails to show that any damage resulted to the plaintiff under the laws of the Canal Zone, by reason of the death of the said Rachael Rock;

and to which ruling defendant company then and there in open Court excepted.

III.

The Court erred in overruling defendant company's motion for a directed verdict in its favor at the close of all the evidence, which motion was based on the following grounds:

(1) The evidence fails to show that the death of Rachael Rock was due to the negligence of the defendant company;

(2). Plaintiff's cause of action is one which does not survive under the laws of the Canal Zone;

(3). The evidence fails to show that any damages resulted to the plaintiff under the laws of the Canal Zone; by reason of the death of the said Rachael Rock;

and to which ruling of the Court defendant then and there in open Court excepted.

IV.

The Court erred in overruling defendant Company's request to withdraw the stipulation entered into by counsel for the respective parties, and which stipulation had been previously read to the jury and filed in evidence, on the ground that, over the defendant's objection, the admission of proof was being allowed on matters of fact already covered in said stipulation, to which ruling the defendant company then and there in open Court duly excepted.

V.

The Court erred in refusing to give defendant company's request for instructions number one, which read as follows:

"Gentlemen of the Jury:

You are instructed that the defendant company is not an insurer against injuries to passengers, and that there was no implied contract between the defendant and the plaintiff guaranteeing that the latter would be transported safely. The plaintiff's right of action in this

case, if any exists, is based upon the specific
59 charges of negligence set out against the defendant in plaintiff's complaint, and the burden of proof that the defendant was negligent, as charged in plaintiff's complaint, is on the plaintiff; and, therefore, unless the jury believe from the evidence that the defendant was at fault in respect to the way the train in question was managed and that the plaintiff was thereby injured; or that the company constructed its roadbed so unskillfully and imperfectly and suffered the same to be in a defective condition as to result in the injury complained of; or that improper equipment was used in making up the said train, or that said train was being operated at such a dangerous rate of speed upon a down grade and at a curve as to cause one of the said cars to run off the track and drag from the same and overturn the car in which the plaintiff was seated, your verdict must be for the defendant.

In applying the foregoing instructions to the fact of the case, the jury should bear in mind that the law requires of the defendant in this case that degree of care which prudent men would take to guard against all dangers from whatever source arising which may naturally and according to the usual course of things be expected to occur. The defendant is not an insurer of the safety of its passengers further than could be required by the exercise of such a high degree of foresight and prudence with reference to probable dangers and in guarding against them as would be used by every cautious, prudent, and competent person under similar circumstances. The defendant in this case was not required to use the utmost degree of care which the human mind is capable of imagining. Such a rule would require from the defendant such an expenditure of money and the employment of hands as would prevent

all persons of ordinary prudence from engaging in the railroad business. You are advised that the rule requires that the highest degree of practical care and diligence should be used that is consistent with the mode of transportation adopted, and you are further instructed that the speed of the train, although you may find it was unusually high at the time of the accident, of itself would not constitute negligence if unaccompanied by any other circumstances tending to prove want of care in the defendant in the manner and form as charged by the plaintiff in his complaint.

You are further instructed that in determining whether the defendant has been negligent in the manner and form as charged by the plaintiff in his complaint you cannot assume from the mere fact of the accident that the defendant was negligent. The law authorizes you to draw reasonable inferences from the facts proven, and only from the facts proven, and without this basis of fact you are not authorized to indulge in inferences as to the defendant's negligence;"

to which ruling defendant then and there in open Court excepted.

VI.

The Court erred in refusing to give defendant Company's Request for Instructions Number Two, which read as follows:

"You are instructed that under the laws of the Canal Zone you cannot allow the plaintiff anything by way of solatium for his grief and wounded feelings, or as a compensation for the mere loss of society or companionship, which he has sustained because of the death of his wife;"

to which ruling defendant then and there in open Court excepted.

VII.

The Court erred in refusing to give defendant Company's Request for Instructions Number Three, which read as follows:

"You are instructed that if after hearing all of defendant's and all of plaintiff's testimony adduced during the course of the trial you are of the opinion that the cause of the accident has not been explained and cannot be reasonably and logically deducted or inferred from all the testimony in regard to the wreck which you have heard, then in that event I charge you that plaintiff has failed to establish the negligence of the company by a proper preponderance and weight of the evidence, and your verdict must be for the defendant company;"

to which ruling defendant then and there in open Court excepted.

60

VIII.

The Court erred in refusing to give defendant Company's Request for Instructions Number Four, which read as follows:

"You are charged that if all the evidence and testimony adduced by the plaintiff and all the evidence and testimony adduced by the defendant company has the effect of leaving you in doubt as to the negligence of the defendant company, then plaintiff has not proven negligence on the part of the defendant company, and your verdict must be for the defendant;"

to which ruling defendant then and there in open Court excepted.

IX.

The Court erred in refusing to give defendant company's Request for Instructions Number Five, which read as follows:

"You are charged that the gravamen or gist of the case which you have been trying as jurors is the negligence or non-negligence of the defendant company, and if you are not satisfied in your minds that the defendant company was guilty of negligence then your verdict must be for the defendant company."

to which ruling defendant then and there in open Court excepted.

X.

The Court erred in its written charge to the jury, in that part thereof appearing on page 1 and the first half of page 2 thereof, which reads as follows:

"Gentlemen of the Jury:

"This is an action brought by James Rock against the defendant, the Panama Railroad Company, for damages for the alleged wrongful death of the plaintiff's wife as a result of the negligence of the defendant. The plaintiff alleges in his complaint that he is a resident of Gatun, Canal Zone, and is the only surviving heir at law of Rachael Rock, plaintiff's deceased wife, and plaintiff brings this action for himself and in his capacity as heir of the said Rachael Rock, deceased, and that the defendant is a

common carrier by railroad within the Canal Zone, and at all times hereinafter mentioned defendant was such common carrier of persons and property for hire, and was such common carrier and was operating said railroad on the 20th day of May, 1918.

"Plaintiff further alleges that on the 20th day of May, 1918, and a long time prior thereto, he was the lawful husband of Rachael Rock, deceased, and living with his said wife in the town of Gatun, and that he is the legal hier and her only surviving heir at law.

"That on the 20th day of May, 1918, said Rachael Rock, for the usual customary cash consideration which was then and there paid by the said plaintiff's decedent unto the defendant, she purchased from the defendant a certain railroad ticket, by the terms of which defendant promised and agreed to undertake to safely carry plaintiff's decedent as passenger in a second-class coach or car of one of the defendant's passenger trains, from the city of Panama, Republic of Panama, through and across the Canal Zone to the town of Gatun, Canal Zone, * * etc., and that plaintiff's said decedent did then and there go aboard and enter said second-class coach or car of said defendant's train and become a passenger thereon, etc.

"That while plaintiff's decedent was such passenger, the defendant and its servants and employees so negligently conducted itself and themselves in the operation and management of said train of cars, and in having its tracks so unskillfully and improperly constructed, etc., as to cause the derailment of said train of cars at or near a place known as Gamboa, in the Canal Zone, and that the coach or car wherein said plaintiff's decedent was riding as a passenger, was suddenly and violently thrown from the tracks while said train was being operated by the defendant at a great and dangerous rate of speed upon a down grade and at a curve, and that said car was over-

thrown and whereby said Rachael Rock, plaintiff's decedent, received great and severe bodily injuries from which she suffered great and severe bodily, physical pain and mental anguish, and from which said injuries, received as aforesaid, died on the said 20th day of May, 1918, etc., and plaintiff suffered damages in the sum of fifteen thousand dollars ($15,000.00), for which he prays judgment.

61 for the reason that said part of the Court's charge is a quotation of all of plaintiff's complaint filed in this cause, is couched in technical legal terms, which were not explained to the jury and could not be comprehended by the jury and to which part of the charge defendant company then and there in open Court excepted.

XI.

The Court erred in that part of its written charge to the jury appearing on the center of page 2 thereof, which reads as follows:

"To this complaint the defendant has filed its general denial. The burden of proof in this case is on the plaintiff, and unless you are reasonably satisfied by preponderance of the evidence that the plaintiff is entitled to recover, you must find for the defendant;"

for the reason that the Court used the highly technical expressions "burden of proof," "General denial," and "preponderance of evidence" without defining said terms, which, used in the abstract manner indicated, would not have been comprehended by the jury, and to which part of the charge defendant then and there in open Court excepted.

XII.

The Court erred in that part of its written charge to the jury appearing in the last paragraph on page 2 thereof, which reads as follows:

"The plaintiff can only recover when he has satisfied you by a preponderance of the evidence that his wife's death was the result of the negligence of the defendant company, and even if you should find the defendant company was negligent in the manner in which it was operating its train at the time and at the point of accident, yet if the plaintiff's decedent herself was negligent and her negligence contributed to her death then the plaintiff is not entitled to recover, notwithstanding the negligence of the defendant, or if the accident was sustained because they were mutually negligent, plaintiff cannot recover;"

for the reason that in said part of the charge the jury is given an erroneous statement of the law regarding the survival of an action for death by wrongful act, and furthermore, said part of the charge injects into the issues of the case the matter of contributory negligence of decedent, which was not an issue raised by the evidence adduced at the trial by either of the parties thereto, to which part of the charge defendant then and there in open Court excepted.

XIII.

The Court erred in that part of its written charge to the jury appearing on page 3 thereof, which read as follows:

"The Court instructs the jury that negligence, whether on the part of the defendant or plaintiff's decedent may be briefly defined to be the doing or failing to do of some act or thing which, under the circumstances, it is the duty of the party to do or to leave undone; or, in other words, negligence is a failure to exercise that degree of care and diligence that an ordinarily prudent person would exercise in his own affairs under like or similar circumstances. That is, negligence is the want or omission of reasonable care and diligence, the failure to do something which a reasonable person, guided by those considerations which ordinarily regulate the conduct of human affairs under the circumstances, would do, or the doing of something which such person under such circumstances would not do. And it may be further defined to be a failure to observe, for the protection of the interest of another person, that degree of care, precaution and vigilance, which the circumstances justly demanded, whereby such other person suffers injury."

for the reason that said part of the charge injects into the issues of the case the question of decedent's contributory negligence which was not an issue raised by the evidence adduced at the trial by either of the parties thereto, and to which part of the charge defendant then and there in open Court excepted.

XIV.

62 The Court erred in that part of its written charge to the jury appearing on page 4 thereof, which reads as follows:

"The Court instructs the jury that "contributory negligence" is such negligence on the part of plaintiff's de-

cedent as helped to produce the death complained of, and if the jury find, from a preponderance of all the evidence in this case, that plaintiff's decedent was guilty of any negligence that helped to bring about or produce the death complained of, then in that case, the plaintiff cannot recover in this action; or, in other words, "contributory negligence means a failure upon the part of the plaintiff's decedent, if she did so fail, to observe care for her own safety, and by reason of such failure she helped to cause or bring about her death, and when but for such failure she would not have been killed;"

for the reason that said part of the charge again injects into the issues of the case the question of decedent's contributory negligence, which issue was one not raised by any of the evidence adduced at the trial by either of the parties thereto and to which part of the charge defendant then and there in open Court duly excepted.

XV.

The Court erred in that part of its written charge to the jury appearing on page 5 thereof, which reads as follows:

"Under the rule of respondent superior, a corporation is civilly liable for torts committed by its agent or servant while acting within the scope of its employment, although the corporation neither authorized the doing of the particular act, or ratified it after it was done. The modern law is, that whenever the agent of a corporation, proceeding within the general scope of its powers and of the power delegated by it to him, commits a wrong, the corporation must pay damages to the person injured, just as a natural person would be compelled to do under like

circumstances. And the corporation is also liable for the negligence of its agents or servants resulting in the failure to perform duties imposed upon it for consequent injury to one to whom such duties are owing, even though the servants were carefully selected with reference to their competency. The employer's duty is not fully discharged in such a case when he exercises care in the selection of employees, although it was his duty to exercise such care, but he is liable for not seeing to it that his employees perform their duties with reasonable care, skill and diligence;"

for the reason that none of the issues raised by the evidence adduced during the trial of the cause by either party thereto warranted a definition of or reference to the doctrine of respondeat superior, to which part of the charge defendant then and there in open Court excepted.

XVI.

The Court erred in that part of its written charge to the jury appearing on page 6 thereof, which reads as follows:

"The law exacts of a railway company engaged in carrying passengers the highest practicable care for the safety of its passengers in the operation of its trains. And if you are convinced by the evidence in this case that the plaintiff's decedent was a passenger on defendant's train, and was violently thrown from her seat in the coach and killed by reason of the train on which she was riding being derailed, and if you further find that no explanation thereof is made by the defendant at the trial of this case, the defendant's negligence and the decedent's freedom from contributory negligence are established.

But if the defendant has made explanation satisfactory to you, and you are convinced from the evidence in the case that the defendant was not negligent, or that the plaintiff's decedent was guilty of contributory negligence, then in such case your verdict would be for the defendant;"

for the reason that the Court therein incorrectly states the law of the case to the jury, and, furthermore, said part of the charge again injects into the issues of the cause decedent's contributory negligence which was not an issue under any of the evidence adduced by either party during the trial of the cause, and to which part of the charge defendant company then and there in open Court duly excepted.

63 XVII.

The Court erred in that part of its written charge to the jury appearing on page 7 thereof, which reads as follows:

"The Court instructs the jury that the proximate cause of an event is that which in a natural and continuous sequence, unbroken by any new cause, produces the event. The consequences must be the natural and probable consequence, distinguishd from the possible consequences. The natural and probable consequences are those which human foresight can forsee, because they happen so frequently that they may be expected to happen again, and in order to award a finding that negligence is the natural and probable consequence of the negligence act, and that it ought to have been forseen,—not necessarily the precise, actual injury, but some like injury likely to result therefrom;"

for the reason that in said part of the charge the Court defines the doctrine of proximate cause, and so puts in issue a matter to be determined by the jury which was not raised by any of the evidence adduced by either party during the trial of the cause, and to which part of the charge the defendant then and there in open Court duly excepted.

XVIII.

The Court erred in that part of its written charge to the jury appearing on page 8 thereof, which reads as follows:

"If the jury are reasonably satisfied from the evidence that the plaintiff's decedent on the 20th day of May, 1918, purchased from the defendant a railroad ticket by the terms of which the defendant company promised and agreed to and with the plaintiff's decedent in consideration of the payment unto defendant of the purchase price of said ticket, to safely carry plaintiff's said wife, Rachael Rock, as passenger on a second-class coach or car of one of defendant's passenger trains from the city of Panama to and across the Canal Zone to the city or town of Gatun, Canal Zone, and plaintiff's decedent duly tendered and presented said ticket to the said defendant, and defendant received said ticket and permitted and invited plaintiff's decedent aboard a second-class coach or car of the defendant's passenger train, to be carried as a passenger from the City of Panama aforesaid to the said city or town of Gatun, and that the said Rachael Rock, did go aboard defendant's train, and while riding to said city or town of Gatun the train of cars, or some of the cars, thereof, ran off the track and plaintiff's said wife was killed thereby, then the plaintiff

makes out a prima facia case for recovery, and is entitled to recover, unless the defendant reasonably overcomes this prima facia right of recovery by the evidence in the case;'

for the reason that it is thereby left to the jury as to whether or not plaintiff's decedent was a passenger on the wrecked train, notwithstanding the fact that under the stipulation entered into between counsel for the parties in this cause, and which stipulation was read to the jury and filed in evidence, it was a settled fact that said decedent was a passenger; furthermore, the Court in said part of its charge makes use of the terms "prima facie right to recover" and "weight of evidence" in an abstract sense, without defining said terms, to which part of the charge defendant then and there in open Court excepted.

The Court erred in that part of its written charge to the jury appearing on page 9 thereof, which reads as follows:

"Evidence has been introduced tending to show that the defendant's railroad track at and along and near the point of the accident was at the time of the accident in first-class condition, including the road bed, the ties, the rails and the binding of the rails together, and the attachments of the rails to the ties. There is also evidence tending to show that the railroad train, consisting of the engine and all of the cars, had been inspected immediately before the train started from the city of Panama, and was in first-class condition, and that the air had been tested and found working and in perfect order, and there is no evidence to show that any injury
64 or defect to any of the cars in the train had occurred between Panama and the point of the ac-

cident. Evidence was also introduced showing that the train had within it a refrigerator car filled with beef to its fullest capacity, and that this car was ahead of the passenger coaches and this car was first-class in every respect, including the trucks and wheels, and flanges, and that it was the first car to leave the track, and as the result of its leaving the track the cars in the rear, in one of which the plaintiff's decedent was seated, were wrecked, causing her death. If you believe from the evidence that the roadbed at, along and near the point of the accident, and the rails and ties and the connections and fastenings of the ties together, and on the ties, were all in first-class, good condition at and prior to the time of the accident, and if you further believe from the evidence that the locomotive and cars being pulled by the locomotive at the time of the accident were all in first-class condition and no defects in the same, so far as proper care and inspection of such cars would reveal, and that the defendant had used every ordinary care and prudence in inspecting the car and track, and that no defect in either could be discovered, then so far as these two matters are concerned it would be your duty to find for the defendant;"

for the reason that said part of the charge leaves it to the jury, as an open question, as to whether or not defendant company's tracks, ties and roadbed at the scene of the accident were in good and proper condition and as to whether or not the train was properly inspected before it commenced its journey across the Isthmus, notwithstanding that the stipulation entered into between counsel for the parties and which was read to the jury and filed in evidence affirmatively settles it as a fact that said ties, rails and roadbed were in good condition and that testimony of defendant's wit-

nesses, to the effect that the train was properly inspected before it commenced its trip was uncontradicted and uncontroverted; to which part of the charge the defendant company then and there in open Court excepted.

XX.

The Court erred in that part of its written instructions to the jury appearing on pages 11 and 12 thereof, which reads as follows:

"If the plaintiff's decedent, his wife, was a passenger upon defendant's road in one of defendant's coaches as charged in his complaint, the defendant's obligation was to carry said decedent safely and properly; and if the defendant entrusted this duty to the servants of the Company, the law holds the defendant responsible for the manner in which they executed it. The carrier is obliged to protect its passengers from improper and unnecessary violence at the hands of its own servants. And the established law is that a carrier is responsible for the negligence and wrongful conduct of its servants suffered or done in the line of their employment whereby a passenger is injured. The carrier is not an insurer of its passengers' safety against every possible source of danger, but is bound to use all such reasonable precaution as human judgment and foresight are capable of to make its passengers' journey safe and comfortable. This degree of care is required and applied not only to the manner in which the train was being run by the engineer and trainmen, but also to the running gear and equipment of the engine, tenders, and cars, and the way in which its roadbed was constructed, and its ties and rails laid and maintained; and if you believe from the evidence that the defendant failed to exercise such care in any of these particulars, and such failure caused the derailment result-

ing in the death of plaintiff's decedent, your verdict must be for the plaintiff, but if on the contrary, you believe from the evidence that the defendant had exercised such care then you must find for the defendant. If you believe from the evidence that defendant's train of cars in which plaintiff's decedent was being carried as passenger on the 20th day of May, 1918, was thrown from the track causing the death of plaintiff's decedent as alleged in his complaint, and the cause of such action is one in which the highest degree of practical care, skill and caution consistent with operating the road, the defendant could not have provided against, and the said train was not thrown from the track because of the mode and construction and repair of said track or by excessive speed and not because of any fault or neglect whatever of the defendant, its agents or servants, then the jury should find for the defendant as to the injuries to the person of plaintiff's decedent in the petition complained of. But, if the jury find from the evidence the railroad track where said accident occurred was unsafe and in dangerous condition that might have been remedied or guarded against by the exercise by the defendant's employees of the highest degree of
65 care and skill then practical and then known on track repairs, and that such unsafe and dangerous condition of said railroad track also contributed to said condition, the law is for the plaintiff, and he is entitled to compensatory damages, but he can only recover such damages, if any, as flow from and are the immediate results of the injury alleged in the complaint. Damage produced by other agencies than those causing the alleged injury, or even any agencies remotely connected with those causing the injury, cannot be awarded as proximate or proper compensation;"

for the reason that the said part of the charge left it to the jury as an open question as to whether or not defendant company's tracks, ties, and roadbed at the place of the accident were in good and proper condition, which fact was settled in the affirmative by the stipulation entered into between counsel for the parties to this cause, and which stipulation was read to the jury and filed in evidence during the trial of the said cause; in said part of the charge the Court furthermore made use of the technical term "compensatory damages" without defining said term, and, furthermore, the jury is thereby instructed that they may find "for the defendant as to the injuries to the person of plaintiff's decedent" under certain facts; the said part of the charge was also an erroneous statement of the law of the case; and to which part of the charge the defendant then and there in open Court excepted.

XXI.

The Court erred in the part of its written charge to the jury appearing on page 14 thereof, which reads as follows:

"The Court instructs the jury that it is the undisputed evidence in this case that the plaintiff's wife was a passenger on defendant's car at the time and place complained of by plaintiff; the defendant having received plaintiff's wife upon board of such train, the due obligation of the defendant to plaintiff's wife was to use the highest degree of care practical and known among prudent, skillful and experienced men in that kind of business, to carry her safely, and a failure of the defendant (if you believe there was a failure) to use such highest degree of care would constitute negligence on its part,

and defendant would be responsible for all injuries resulting to plaintiff and plaintiff's wife, if any, from such negligence, if any; and it is undisputed evidence in this case that the car in which plantiff's wife was riding together with other cars in said train operated by the defendant at the time and place alleged was derailed, and the plaintiff's wife was killed as a result of such derailment of the car in which she was riding. The presumption is that it was occasioned by some negligence of dedefendant, and the burden of proof is cast upon the defendant to rebut this presumption of negligence and establish the fact that there was no negligence on its part, and that the injury and death of the plaintiff's wife was occasioned by an inevitable accident, or by some cause which said highest degree of care would not have avoided."

for the reason that therein the jury is instructed that under certain facts the defendant would be responsible "for all injuries resulting to plaintiff and plaintiff's wife", thereby injecting an element of damages into the case for which no recovery was being sought by plaintiff; under said part of the charge the jury is also permitted to find for the plaintiff "for all injuries resulting to plaintiff" without limiting such recovery as to the elements alleged by plaintiff in his complaint. Said part of the charge was also an erroneous statement of the general law of the case; said part of the charge furthermore makes use of the highly technical terms "burden of proof," "presumption of negligence," and "inevitable accident," without defining and applying said terms to the circumstances of the case, and to which part of the charge defendant company then and there in open Court excepted.

XXII.

The Court erred in that part of its written charge to the jury appearing on pages 16 and 17 thereof,
66 which reads as follows:

"The Court instructs the jury that if you believe that the deceased, the wife of the plaintiff, met her death through the wrongful act of the defendant as charged in the complaint, in assessing damages, while you must assess with reference to pecuniary injuries sustained by the plaintiff in consequence of the death of his wife, you are not limited to loss actually sustained at the precise period of her death, but may include all prospective loss provided they are such as the jury believe from the evidence will actually result to the plaintiff as proximate damages arising from the death of his wife. And in determining the damages sustained by the husband you have the right to take into consideration the pecuniary loss, if any, sustained by him in being deprived of the services of his wife.

"It is difficult to adduce direct evidence of the exact pecuniary loss occasioned the plaintiff by the death of his wife, or to show the exact value of her services, and you are committed to determine the question of damages from your own observation, experience, and knowledge conscientiously applied to the facts and circumstances of the case which have been detailed to you by the witnesses in the trial of this case. The age of plaintiff's wife, the health she enjoyed, the money, if any, she was making by her labor, and her habits are data from which you may argue how long she would probably live and work, and what her life would be worth to the husband in its pecuniary value. And in assessing damages sustained by

the plaintiff you should allow such pecuniary damages which were the direct result of the death of his said wife.

"The measure of damages in this case is the present value of the amount of money which the plaintiff, during the continuance of said wife's life, would have received from her had she lived. The present value of a sum of money payable in the future is what that sum is worth if paid presently,—paid now. For example, the present value of $1.00 at 6% at the end of one year is found by dividing $1.00 by $1.06; and the present value of $1.00 at the end of two years is found by dividing $1.00 by $1.12;—which process you may follow throughout your calculation, if you desire, but are not required to follow this precise method. Having, from the evidence, fixed as accurately and as fair as you possibly can, the number of dollars representing the yearly earnings of deceased, from all the evidence, her expectancy, (that is, the number of years which she would probably have lived) you could by multiplying one of these numbers by the other determine approximately what would have been the gross amount of her earnings of her whole life time, that is from the time of her death. This gross amount, when ascertained, would, of course, have to be reduced to its present value; that is to an amount which, paid down, would be the just and legal cash equivalent of such gross amount—the longer the life the greater would be the difference in these respective sums. If you pursue the course indicated and arrive at the gross amount in the manner which has just been explained to you it will then be incumbent upon you to make the necessary calculation for ascertaining its present cash value, and you can do this in the manner pointed out in this instruction, or by any other proper and legal method;"

for the reason that said part of the charge is an incorrect statement of the law of the case and to which part of the charge defendant then and there in open Court excepted.

XXIII.

The Court erred in overruling defendant's objections to the judgment entered in plaintiff's favor, to which ruling defendant then and there in open Court excepted.

Wherefore, defendant prays that the judgment of the District Court of the Canal Zone, Division of Balboa, be reviewed by the United States Circuit Court of Appeals for the Fifth Circuit, that the said judgment be reversed, and a judgment entered in favor of defendant.

PANAMA RAILROAD COMPANY,
a Corporation.

By FRANK FEUILLE,
WALTER F. VAN DAME,
Its Attorneys.

U. S. Circuit Court of Appeals. Filed July 16th, 1920. Frank H. Mortimer, Clerk.

67 BOND ON WRIT OF ERROR AND SUPERSEDEAS.

United States of America.

In the United States Circuit Court of Appeals for the Fifth Circuit.

Panama Railroad Company, a Corporation.
Plaintiff in Erorr.

vs.

James Rock,
Defendant in Error.

Bond on Writ of Error and Supersedeas.

Know all men by these presents that the Panama Railroad Company, a New York Corporation, acting by and through its President, Chester Harding, as principal, and the Globe Indemnity Company, as surety, are held and firmly bound unto James Rock in the sum of Five Thousand Dollars, United States Currency, to be paid to said James Rock, to which payment well and truly to be made, we bind ourselves jointly and severally by these presents.

Sealed with our seals and dates this 13th day of July 1920.

PANAMA RAILROAD COMPANY,
A Corporation.
By MONTE M. LEMANN,
(Seal) Its Attorney in Fact.
(Seal) GLOBE INDEMNITY COMPANY,
By WILLIAM H. KLINESMITH,
Its Attorney in Fact.

Whereas the above named plaintiff in error, the Panama Railroad Company, a corporation, has sued out a writ of error from the United States Circuit Court of Appeals for the Fifth Circuit to the District Court of the Canal Zone, to reverse the judgment of the District ourt of the Canal Zone rendered on the twenty-second day of June, 1920, in the suit of James Rock, vs. the Panama Railroad Company, a corporation;

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damages that may be adjudged, if they shall fail to make good their plea, then this obligation is to be void; otherwise to remain in full force and effect.

PANAMA RAILROAD COMPANY,
A Corporation.

By MONTE M. LEMANN,
(Seal) Its Attorney in Fact.

GLOBE INDEMNITY COMPANY,
By WILLIAM H. KLINESMITH,
(Seal) Its Attorney in Fact.

Approved and stay of execution ordered, this 15th day of July 1920.

R. W. WALKER,
Judge, United States Circuit Court of Appeals for the Fifth District.

ORDER ALLOWING WRIT OF ERROR.

United States of America.

In the United States Circuit Court of Appeals for the Fifth Circuit.

68 Panama Railroad Company, a Corporation.
Plaintiff in Error.

vs.

James Rock,
Defendant in Error.

Order Allowing Writ of Error.

On reading the petition of the Panama Railroad Company, a Corporation, plaintiff in error in the above styled cause, for writ of error, and the assignment of errors, and upon due consideration of the record of said cause;

It is ordered that a writ of error be allowed from the United States Circuit Court of Appeals for the Fifth Circuit to the District Court of the Canal Zone, Division of Balboa, as prayed for in said petition, and that said writ of error and citation thereon be issued, served and returned to the United States Circuit Court of Appeals for the Fifth Circuit in accordance with law, upon condition that the said petitioner and plaintiff in error, the Panama Railroad Company, a Corporation, give security in the sum of Five Thousnd Dollars, that the said plaintiff in error shall prosecute said writ of error to effect, and, if said plaintiff in error fail to make good its plea, shall answer to the defendant in error for all costs and damages that may be adjudged or decreed on account of said writ of error.

And the said plaintiff in error now presenting a bond in the sum of Five Thousand Dollars, with the Globe Indemnity Company, as surety, it is ordered that the same be and hereby is duly approved.

In witness whereof I have hereunto set my hand this 15th day of July, 1920.

R. W. WALKER,
Judge, United States Circuit Court of Appeals for the Fifth Circuit.

U. S. Circuit Court of Appeals. Filed July 16th, 1920. Frank H. Mortimer, Clerk.

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69 Writ of Error and Citation omitted from the printed Record, being filed in the Original.

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70 STIPULATION.

United States of America.

In the District Court of the Canal Zone, Division of Balboa.

Panama Railroad Company, a Corporation,
Plaintiff in Error.

vs.

James Rock,
Defendant in Error.

To the United States Circuit Court of Appeals for the Fifth Circuit, sitting at New Orleans, Louisiana;

Now comes Frank Feuille and Walter F. Van Dame, and W. C. Todd and William C. MacIntyre, counsel for plaintiff in error and counsel for defendant in error, respectively, in the above numbered and styled cause, and agree that that certain blue print marked, "Defendant's Exhibit 'B' ", and forming part of the record herein, be omitted from the printed record and instead that the same be forwarded to and considered by the Court as an original document upon the hearing of the case.

FRANK FEUILLE, and
W. F. VAN DAME,
Counsel for the Panama Railroad Company, Plaintiff in error.

WM. C. MacINTYRE,
of Counsel for James Rock, Defendant in Error.
for Todd & MacIntyre.

Filed August 18th, 1920, in the office of the Clerk of the District Court, Canal Zone,

(Sgd.) E. M. GOOLSBY, Clerk.

71 Blue Print marked Defendant's Exhibit "B" omitted from the printed record pursuant to foregoing stipulation.

72 CLERK'S CERTIFICATE.

United States of America, ss.
Canal Zone.

In the District Court of the Canal Zone for the Division of Balboa.

I, E. M. GOOLSBY, Clerk of the District Court of the Canal Zone, Division of Balboa, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages numbered 1 to 56 1/2 inclusive, contain a true and complete transcript of the record and proceedings had in the said Court in the cause entitled, "Panama Railroad Company, a Corporation, Plaintiff in Erorr, vs. James Rock, Defendant in Error," up to and including the suing out of the writ of error from the United States Circuit Court of Appeals for the Fifth Circuit, to the District Court of the Canal Zone, together with a true and complete copy of the certified copy of the writ of error lodged with me on July 27, 1920, as I have thereon indicated; also defendant's original exhibit "B", and the stipulation of counsel for the parties to this cause whereby said exhibit "B" is to be omitted from the printed record and is to be forwarded to and considered by the Circuit Court of Appeals as an original document.

In witness whereof, I have hereunto affixed my signature and the seal of the said Court at the court house in Ancon, Canal Zone, in the Balboa Division for the District Court of the Canal Zone, on this 28th day of August, in the year of our Lord, One thousand nine hundred and twenty and of the Independence of the United States the one hundred forty-fourth.

E. M. GOOLSBY,
(Seal) Clerk, District Court of the Canal Zone.

That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Copy of Motion of Plaintiff in Error to Authenticate Bill of Exceptions Nunc Pro Tunc.

Filed November 30th, 1920.

UNITED STATES OF AMERICA,
Canal Zone:

In the District Court of the Canal Zone, District of Balboa.

JAMES ROCK, Plaintiff,

vs.

PANAMA RAILROAD COMPANY, a Corporation, Defendant.

Comes now the defendant company in the above styled and numbered cause, by its attorney, Walter F. Van Dame, and the Honorable Court respectfully represents and prays:

(1) That final judgment was entered by the Court in plaintiff's favor, and against the defendant, on June 22, 1920, the defendant company thereupon being allowed thirty days within which to file its bill of exceptions;

(2) That on June 29, 1920, the Honorable Judge of the Court left the Canal Zone on a vacation, which the Honorable Court has spent in the United States, and from which vacation the said Judge returned on October 19, 1920;

(3) That the defendant company prepared its bill of exceptions in the above styled and numbered cause, and submitted same to the Acting Clerk of the Court for the examination, approval, and authentication of the Honorable Court on the 21st day of July, 1920, said bill of exceptions having been theretofore settled by agreement of counsel for the respective parties to this cause on the 20th day of July, 1920;

(4) That the herein mentioned bill of exceptions, because of the fact that the Honorable Court was on vacation at the time said bill of exceptions was presented for examination, approval, and authentication, as aforesaid, up to this time remains unexamined, unapproved, and unauthenticated by the Honorable Court.

Wherefore, the defendant prays the Honorable Court to examine, approve, and authenticate the aforementioned bill of exceptions by signing the same at this time, as of the 21st day of July, 1920.

PANAMA RAILROAD COMPANY,
A CORPORATION, *Defendant,*
By W. F. VAN DAME,
Its Attorney.

Filed in open court this 21 day of Oct., 1920.
E. M. GOOLSBY,
Clerk of Court.

UNITED STATES OF AMERICA,
Canal Zone, ss:

I, E. M. Goolsby, Clerk of the District Court of the Canal Zone, Division of Balboa, do hereby certify that the foregoing is a true and correct copy of the Motion to Authenticate Bill of Exceptions Nunc Pro Tunc, in the cause entitled "James Rock vs. Panama Railroad Company."

Witness my hand and seal this 10th day of November, A. D. 1920.

[SEAL.] (Signed) E. M. GOOLSBY,
Clerk District Court of the Canal Zone.

Copy of Certificate of Trial Judge as to Signing of Bill of Exceptions.

Filed November 30th, 1920.

UNITED STATES OF AMERICA,
Canal Zone:

In the District Court of the Canal Zone, Division of Balboa.

JAMES ROCK, Plaintiff,

vs.

PANAMA RAILROAD COMPANY, Defendant.

I, John W. Hanan, United States District Judge of the Canal Zone, do hereby certify that the record in the above styled and numbered cause discloses:

That final judgment was entered in plaintiff's favor against defendant company on June 22, 1920, and that defendant company was on said date granted thirty days within which to file its bill of exceptions in said cause; that on June 29th, 1920, the Judge of said Court left the Canal Zone on a vacation to be spent and which has been spent outside of this District, from which vacation said Judge returned on October 19th, 1920; that on July 20th, 1920, defendant's bill of exceptions herein was settled by agreement of the attorneys for the respective parties, and thereafter on July 21st, 1920, said bill of exceptions was presented to the Acting Clerk of the Court for the examination, approval, and authentication thereof by the trial Judge, at which time, however, as above stated, said trial Judge was outside of this District and to which District said Judge did not return until October 19th, 1920.

Wherefore, upon defendant company's motion, the bill of exceptions herein is now and hereby examined, approved and signed as

of the 21st day of July, 1920. That on the 22nd day of June, 1920, in open court both parties agreed that the court should authorize the Clerk to sign the Judge's name to the bill of exceptions after the same had been agreed upon by counsel and the Court so ordered and the Clerk did sign the Judge's name to the bill of exceptions as ordered on July 21, 1920.

Done in Chambers, at the Courthouse in Ancon, on this 6th day of November, A. D. 1920.

[Seal District Court of Canal Zone.]

JOHN W. HANAN,
United States District Judge for the Canal Zone.

Attest:
E. M. GOOLSBY,
Clerk of the said Court.

Filed Nov. 6, 1920, in the office of the Clerk of the District Court, Canal Zone.
E. M. GOOLSBY,
Clerk.

UNITED STATES OF AMERICA,
Canal Zone:

I, E. M. Goolsby, Clerk of the District Court of the Canal Zone, Division of Balboa, do hereby certify that the foregoing is a true and correct copy of the certificate of the Trial Judge re signing of bill of exceptions in the cause entitled "James Rock, plaintiff, vs. Panama Railroad Co., defendant," which was filed on the 6th day of November, A. D. 1920.

Witness my hand and seal, this 10th day of November, A. D. 1920.

[SEAL.] (Signed) E. M. GOOLSBY,
Clerk District Court of the Canal Zone.

Copy of Order Approving Bill of Exceptions.

Filed November 30, 1920.

Examined and approved this 21st day of July, 1920.
JOHN W. HANAN,
United States District Judge for the Canal Zone.

JOHN W. HANAN,
United States District Judge for the Canal Zone.

Attest:

[Seal District Court of the Canal Zone.]

E. M. GOOLSBY,
Clerk of the District Court of the Canal Zone.

Attest:

[Seal of the District Court, Canal Zone.]

F. H. SHIEBLEY,
Acting Clerk of said Court.

The foregoing bill of exceptions, setting forth the entire proceedings at the trial, settled by agreement of counsel for the parties to the cause, with the request that the same be filed and made a part of the record in the case, on this 20th day of July, A. D. nineteen hundred and twenty.

TODD AND MACINTYRE,
Counsel for Plaintiff.
FRANK FEUILLE &
WALTER F. VAN DAME,
Counsel for Defendant Company.

Filed July 21st, 1920, in the Office of the Clerk of the District Court, Canal Zone.

F. H. SHIEBLEY,
Acting Clerk.

UNITED STATES OF AMERICA,
Canal Zone, ss:

I, E. M. Goolsby, Clerk of the District Court of the Canal Zone, do hereby certify that the above and foregoing part of a typewritten page is a true and correct copy of Page 56 of the typewritten transcript of record in the cause entitled "Panama Railroad Company, Plaintiff in Error, vs. James Rock, Defendant in Error," bearing No. 3567, filed with and which is now pending on writ of error in the United States Circuit Court of Appeals for the Fifth Circuit, by virtue of a writ of error allowed by the Honorable R. W. Walker, Circuit Judge of the United States Circuit Court of Appeals for the Fifth Circuit on the 15th day of July, 1920, as the original thereof now appears, there having been added since the date of the filing in the said Circuit Court of Appeals of the typewritten transcript of record the personal signature of the Honorable John W. Hanan, United States District Judge for the Canal Zone, attested by myself in my capacity of Clerk of the said Court, which said signature was affixed to the original bill of exceptions in the aforementioned original record on the 6th day of November, 1920, having been added nunc pro tunc on the 6th day of November, 1920, as of the 21st day of July, 1920, in accordance with the certificate on order of the Court in the premises, entered on the 6th day of November, 1920, a certified copy of which is hereto attached, and which order was entered and which signature was affixed to the bill of exceptions in the original transcript of the record in this cause remaining in the files of this court, with the agreement of counsel for the defendant in error and in accordance with the written prayer of the plaintiff in error in the cause, a certified copy of which is also attached hereto.

In witness whereof I have hereunto affixed my signature and the seal of the Court at the Courthouse in Ancon, Canal Zone, Division of Balboa, on this 10th day of November, in the year of our Lord, nineteen hundred and twenty and of the Independence of the United States the One hundred forty-fourth.

[SEAL.] (Signed) E. M. GOOLSBY,
Clerk District Court of the Canal Zone.

Argument and Submission.

Extract from the Minutes of March 2nd, 1921.

No. 3567.

PANAMA RAILROAD COMPANY

versus

JAMES ROCK.

On this day this cause was called, and, after argument by Walter F. Van Dame, Esq., for plaintiff in error, and William C. MacIntyre, Esq., for defendant in error, was submitted to the Court.

Opinion of the Court.

Filed April 15th, 1921.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 3567.

PANAMA RAILROAD COMPANY, Plaintiff in Error,

versus

JAMES ROCK, Defendant in Error.

Error to the District Court of the Canal Zone.

J. Blanc Monroe, Monte M. Lemann, Frank Feuille and Walter F. Van Dame for Plaintiff in Error.
Wm. C. MacIntyre and W. C. Todd for Defendant in Error.

Before Walker, Bryan and King, Circuit Judges.

BRYAN, *Circuit Judge:*

Defendant in error was plaintiff below, and sued to recover damages for the death of his wife, which was caused by the derailment of one of defendant's trains, alleged to be due to its negligence. Plaintiff recovered judgment.

It is assigned for error that the court overruled a demurrer based upon the ground that no cause of action for death by wrongful act exists in the Canal Zone. The statute under which this suit is brought is Section 2341 of the Civil Code of Panama, which was continued in force in the Canal Zone by Executive Order, ratified by Act of Congress in 1912. The statute reads as follows:

"He who shall have been guilty of an offense or fault, which has caused another damage, is obliged to repair it, without prejudice to the principal penalty which the law imposes for the fault or offense committed."

This act was in force in Colombia and Panama prior to the acquisition of the Canal Zone.

To sustain the assignment it is argued that the act creates no liability in cases of death; and that, if liability exists, there is no legal machinery for its enforcement.

1. One of the reasons usually given for the common law doctrine that no action can be maintained for death by wrongful act is that the private injury became merged in the public wrong. But a contrary doctrine has prevailed from early times under the civil law. "He that kills a man unjustly is bound to pay all expenses which may have been incurred for physicians or surgeons, and to give to those whom the person slain was from his relation accustomed to maintain—such as his parents, wife and children—so much as their hope of that maintenance was worth, regard being had to the age of the person slain." Grotius, Book 2, Chap. 17, Sec. 13. Rutherford, in his Institutes on Natural Law, says: "He who kills another unlawfully is obliged to defray such expenses as the person killed may have been at in endeavoring to have his wounds cured. He is obliged, likewise, to make amends to those who had a right to be maintained by the deceased, such as his wife, his children, or his parents, according to the value of what they might have expected to receive from him, considering his age, his fortune, or his employment." Book 1, Ch. 117, Sec. 9.

The early Spanish law, found in the Siete Partidas, Book 7, Title 15, Law 3, reads as follows: "He who causes damage shall make reparation therefor to the person who received it, whether it had been done by himself or by his command or advice, or had happened through his fault."

There is no question that the right of action exists under the Code Napoleon, which provides: "Every act of man which causes damage to another obliges him by whose fault it happened to repair it." The Harrisburg, 119 U. S. 199.

The provision is found in substance in the laws of France, Spain, Chile, Colombia, Cuba, Porto Rico, the Philippines, and other civil law jurisdictions. It was held in Louisiana under the same provision that an action for death would not lie in the absence of statute. Louisiana followed the common law rule instead of the civil law rule. In the arguments and opinions in the cases of Hubgh v. Railroad Company, 6 La. An. 496, and Herman v. Railroad Com-

pany, 11 La. An. 5, will be found elaborate discussions of the Roman, Spanish and French law on this subject.

Denial of the right of recovery in Louisiana rests altogether upon the authority of the first of these two cases. In the second case, the Supreme Court declined to re-consider the question, but stated: "were the question res nova, we should feel great difficulty in arriving at a satisfactory conclusion."

The statute was in force while the Republic of Colombia formed a part of Spain, and although the Civil Code of Colombia, adopted in 1873, was based upon the Civil Code of Chile, yet the Chilean Code in turn was based upon the Spanish Civil Law. In construing the words "offense" and "fault" in Section 341 regard should be had to Title 3, Art. 34, Civil Code of Panama, which is as follows:

"Obligations contracted without an agreement result from the law or from a voluntary act of the parties. Those resulting from the law are expressed therein.

If the contract from which they result be licit, they constitute a quasi contract.

If the act be illicit, and committed with the intention of doing an injury, they constitute a crime. (delito)

If the act be culpable, but committed without the intention of doing an injury, it constitutes a quasi crime or offense."

When so considered, an offense or fault has the same meaning as tort.

Article 2358, Civil Code of Panama provides: "The actions for the repair of the damage arising from an offense or fault, which may be brought against those who may be punishable for the offense or fault, prescribe within the terms fixed in the Penal Code for the prescription of the principal penalty."

It is of no significance, if it be a fact, that civil actions for death by wrongful act were not instituted; because it was a feature of the civil law system that reparation for private wrong was assessed in criminal prosecutions. Penalties were provided for most acts which resulted in personal injury or death, but it is quite clear that damages were awarded, although it was not necessary to bring civil suits in order to obtain them. A separate civil action was sustained in Spain in 1894, and like actions since then have been entertained in Cuba, Porto Rico, and the Philippines. In 1896 separate civil suits were authorized in Panama, although the old system was also continued, by Art. 39 of Law 169, which provides:

"The Civil action for the reparation of damages may be instituted by the party interested in the same criminal proceedings, without the necessity of constituting himself the accuser, and it will be decided in the judgment that puts an end to the criminal case.

It may also be instituted separately before the proper Civil Judge, and in such case the civil action will remain in suspense until the criminal action has been definitely adjudged, regardless as to whether it has been instituted prior or subsequent to the institution of the criminal action. But for torts (the text in Spanish says, 'cuasi-

delictos o culpas') the civil action for damages may be instituted without any dependency upon the criminal action."

It follows, therefore, that, on February 26, 1904, when the President issued his proclamation, the laws of Panama provided for liability for death by wrongful act, and, also, for the enforcement of that liability in either a criminal prosecution or a civil action.

2. No part of the act of 1896, above set out, appears in the Civil Code of the Canal Zone. It is contended that the provision, therein contained, for a separate civil remedy was not continued in effect in the Canal Zone after its acquisition by the United States; that no method is elsewhere prescribed in the Civil Code for enforcing civil liability for death; and that therefore section 2341 is ineffectual.

The proclamation of the President provided that "the laws of the land, with which the inhabitants are familiar, and which were in force in February, 1904, will continue in force in the Canal Zone," etc. The Isthmian Canal Commission was authorized to prepare a Penal Code and a Civil Code for the Canal Zone. Even if they had failed to include a provision to enforce Section 2341, it does not follow that this section would cease to be in effect; for, in view of the President's proclamation, it is not lightly to be assumed that the mere failure to extend a method of procedure for enforcing a civil right, contained in a penal provision, would operate to extinguish that right. The omission of express authority to bring a civil action to recover damages for torts, was doubtless unintentional, and probably due to the fact that the provision was incorporated among the penal provisions of the Panama Code which were all repealed. Again, it is doubted if the Code of Civil Procedure of the Canal Zone was intended to be exclusive, and to repeal all acts not specifically reenacted.

In Section 2 of the Code of Civil Procedure it is stated that its provisions should be liberally construed, and it was further enacted that all codes, statutes, etc., "now in force, insofar as they conflict with the express provisions of this Code, are hereby repealed," etc. (Sec. 920.) If there was no conflict, it is doubtful if there would be a repeal. But, if the failure to include that portion of the Act of 1895, giving a civil right of action to enforce the provisions of Section 2341, be construed as effecting a repeal, the Code of Civil Procedure of the Canal Zone contains ample authority for this action. Section 1 provides that an "action" means "an ordinary suit in a court of justice by which one party prosecutes another for the enforcement or protection of a right, or the redress or prevention of a wrong." Other provisions are:

Section 82 (10): "If the recovery of money or damages is demanded, the amount demanded must be stated."

Section 107. "Every action must be prosecuted in the name of the real party in interest."

Section 172: "The word 'action' as used in this chapter is to be construed, wherever it is necessary to do so, as including a special proceeding of a civil nature."

In addition to all this, under our system of jurisprudence, it is the duty of civil courts to enforce civil rights of action, and special authority to do so is not necessary. Section 2341 is the basis for authority to bring civil suits for damages for personal injury, as well as for death.

In Panama Railroad v. Bosse, 239 Fed. 303, this court affirmed a judgment for personal injury, occurring in the Canal Zone, based upon this particular statute, and its decision was affirmed by the Supreme Court. 249 U. S. 41.

Again, in Panama Railroad Company v. Toppin, 250 Fed. 989, this court upheld the right of action under this statute for a personal injury which occurred in Panama, and its decision was affirmed in 252 U. S. 308. In commenting on the statute now under consideration, the Supreme Court said:

"There seems to have been a rule of practice under the Colombian Judicial Code (Article 1501) by which, if the civil action and the criminal action arising out of the same acts are not brought at the same time, the civil action cannot be prosecuted until the conclusion of the criminal action with the condemnation of the delinquent. But such rule obviously can have no application here; among other reasons because it refers to the case where the same person is liable both civilly and criminally. Here it is the engineer who is liable criminally under the Police Code and the company against whom civil liability is being enforced."

The Supreme Court had in mind also another statute of Panama, enacted in 1887, and reproduced in the opinion, which reads:

"Railroad companies are responsible for the wrongs and injuries which are caused to persons and properties by reason of the service of said railroads and which are imputable to want of care, neglect, or violation of the respective police regulations which shall be issued by the government as soon as the law is promulgated."

This statute was applicable to the Panama Railroad Company. It was then, as it is now, the only railroad company in the Canal Zone.

Other cases in which this court has upheld the right of action for personal injuries are: Bergen Point Iron Works v. Shaw, 249 Fed. 466; Pacific Mail S. S. Company v. Beneby, 250 Fed. 444. It is true that in these cases the point was not made that recovery could only be had as an adjunct to a criminal prosecution, but the cases are to the effect, nevertheless, that civil suits lie for injuries; and if they lie for injuries then they do for death, because all actions for damages, whether for injury or death, are based upon this statute.

3. An assignment is based upon a charge of the court to the effect that if the jury found that no explanation of the wreck was made, the defendant's negligence was established. Immediately following that charge, the court stated that if defendant had made satisfactory explanation, and if the jury were satisfied that the defendant was

not negligent, it should render a verdict of not guilty. In another part of the charge, the jury was instructed that the derailment of the train made out a prima facie case, on which plaintiff was entitled to recover unless the presumption of negligence was overcome.

The acts of negligence pleaded are: the placing of the refrigerator cars, which were much larger than the others, next to the engine and in front of the passenger cars; and excessive speed.

The evidence shows that other wrecks had occurred which could not be explained by any defect in the track or rolling stock, but in each of them the refrigerator cars occupied the same position relative to the passenger coaches. On the issue of speed, the engineer testified the train was running at from 33 to 35 miles per hour; the conductor estimated the speed at 29 miles, although he had testified in the companion case of Castilla, two days before, that the speed ranged from 35 to 40 miles per hour. At the time of the accident the train was on a curve and running down grade.

It is quite clear that the court did not intend to leave the impression upon the jury that the negligence of defendant was established, but only that the fact of the derailment was prima facie evidence of negligence. So construed, the instruction was correct.

San Juan Light Co. v. Requena, 224 U. S. 89.
Bergen Traction Co. v. Damerest, 62 N. J. Law, 755.
Minahan v. R. R. Co., 138 Fed. 37.
Weber v. R. R. Co., 175 Iowa 358.
13 L. R. A. (N. S.), 606.
29 L. R. A. (N. S.), 811.

Error is not made to appear by any of the assignments, and the judgment is affirmed.

(Original filed April 15th, 1921.)

Dissenting Opinion of Walker, Circuit Judge.

Filed April 15th, 1921.

WALKER, *Circuit Judge* (dissenting):

No fact or circumstance has been called to our attention which indicates that while the above set out Article 2341 of the Civil Code was in force in Panama and Colombia prior to the acquisition of the Canal Zone by the United States it was understood or administered as having the effect of giving a civil right of action for the death of a human being caused by the wrong or negligence of another. So far as the writer is informed, no court or commentator whose opinion on the subject would be entitled to weight has expressed the opinion that that provision, standing by itself, gives such a right of action. The only disclosed recognition of the existence of such a right of action as a part of the law of Panama was after the United States acquired dominion over the Canal Zone and was based on enactments

which have not become part of the law of the Canal Zone. By the criminal law of Colombia and Panama, which was not continued in force in the Canal Zone, one guilty of a crime, including homicide, may, in criminal proceedings against him for the offense, be adjudged to make reparation to another who was damaged or injured thereby. Such an award so made is an enforcement of a provision of the public criminal law, though a private person is a beneficiary of such enforcement.

The language used in the Article mentioned certainly does not plainly disclose an intention to give a right of action for wrongful death. A provision of the Louisiana Civil Code, equally if not more, comprehensive in its terms, and which contains nothing indicating that it deals only with offenses or faults involving penal consequences, was held not to give such a right of action. In view of the generality of the language of the provision, the absence of any satisfactory showing that, during the long period of time it was in force prior to the acquisition of the Canal Zone by the United States, the effect was accorded to it of giving a civil right of action for wrongfully or negligently causing the death of a human being, is not without weight in determining the meaning to be given to it as part of the law of Panama which was continued in force in the Canal Zone. The avowed purpose was to continue in force existing private law with which the inhabitants of the acquired territory were familiar. To give a provision of such law so continued in force a meaning not clearly expressed by its language and which, prior to the change of sovereignty, it was not understood to have, practically would amount to changing the law. It is disclosed that, before the change of sovereignty, a familiar incident of criminal proceedings in the territory affected by the change was an adjudication that the wrong-doer make reparation to one who was injured by the commission of the crime, even if the crime was a homicide. It is not disclosed that, prior to the change of sovereignty, the provision in question had acquired the status of familiar law having the effect of giving a civil right of action for wrongfully causing the death of a human being.

Under the common law a civil right of action for wrongfully causing the death of another does not exist in the absence of a statute giving it. The Harrisburg, 119 U. S. 199. Common law principles are not to be ignored in dealing with provisions of a system of private law not of common law origin which is kept in force by the United States in territory acquired from another sovereignty. Panama Railroad Co., v. Bosse, 249 U. S. 41. The rule that a statute disclosing a purpose to do so is required to give a civil right of action for wrongfully causing another's death is a part of the system of law with which the present inhabitants of the Canal Zone are familiar. To accord to the provision in question the effect of giving such a right of action would amount to giving it a meaning not plainly expressed by its language, and which it is not shown to have acquired before it was continued in force in the Canal Zone, and to giving it an effect which such a provision does not have under the law which is familiar to the present inhabitants of that terri-

tory. It well may be supposed that if, prior to the change of sovereignty, the provision in question was authentically recognized as having the meaning now attributed to it in behalf of the defendant in error a satisfactory showing to that effect could and would have been made.

(Original filed April 15th, 1921.)

Judgment.

Extract from the Minutes of April 15th, 1921.

No. 3567.

PANAMA RAILROAD COMPANY

versus

JAMES ROCK.

This cause came on to be heard on the transcript of the record from the District Court of the Canal Zone, and was argued by counsel;

On consideration whereof, it is now ordered and adjudged by this Court, that the judgment of the said District Court in this cause, be, and the same is hereby, affirmed;

It is further ordered and adjudged that the plaintiff in error, Panama Railroad Company, and the surety on the writ of error bond herein, Globe Indemnity Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

Order Extending Time to File Petition for Rehearing.

Extract from the Minutes of April 15th, 1921.

No. 3567.

PANAMA RAILROAD COMPANY

versus

JAMES ROCK.

It is ordered by the Court that a further extension of twenty days, in addition to the time provided in the rules, be allowed within which a petition for rehearing may be filed in this cause.

Petition for Rehearing.

Filed May 25th, 1921.

UNITED STATES OF AMERICA:

In the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, La.

No. 3567.

PANAMA RAILROAD COMPANY, Plaintiff in Error,

vs.

JAMES ROCK, Defendant in Error.

Comes now the Panama Railroad Company, a corporation, plaintiff in error in the above styled and numbered cause, by its attorneys, Frank Feuille and Walter F. Van Dame, and prays the Honorable Court to set aside the judgment heretofore herein rendered and grant a rehearing of this cause, upon the following grounds:

I.

The Honorable Court erred in holding that on February 26, 1904, the date of the President's proclamation of the Canal Treaty between the United States and Panama, that the laws of Panama provided for liability for death by wrongful act, enforceable in a civil action, whereas under the laws and jurisprudence of Colombia and Panama in force and effect therein up to September 30, 1917, when a new system of codes was enacted by Panama, Article 2341 of the Civil Code of Colombia, Panama, and the Canal Zone was never understood or administered by the courts of Colombia and Panama as having the effect of giving a civil right of action for the death of a human being caused by the wrong or negligence of another.

II.

The Honorable Court erred in holding that because under Article 2341 of the Civil Code of the Canal Zone, civil suits lie for personal injuries that therefore an action based on wrongful death is also authorized by said Article of the Civil Code of the Canal Zone.

III.

The Honorable Court erred in disregarding the doctrine heretofore established by the former Supreme Court of the Canal Zone, the Honorable Circuit Court of Appeals for the Fifth Circuit, and the Supreme Court of the United States, to the effect that in interpreting a statute of the Canal Zone, common law doctrines and

principles should be applied thereto unless the wording of such particular statute is in itself hostile to the common law rule.

IV.

The Honorable Court erred in holding that those several assignments of error based on various parts of the Court's charge to the jury were not well taken.

PANAMA RAILROAD COMPANY,
Plaintiff in Error,
By FRANK FEUILLE AND
WALTER F. VAN DAME, *Its Attorneys.*

I, Walter F. Van Dame, of counsel for plaintiff in error herein, do hereby certify that in my judgment the foregoing petition for rehearing is well founded and that the same is not interposed for delay.

WALTER F. VAN DAME,
Of Counsel for Plaintiff in Error.

Order Denying Rehearing.

Extract from the Minutes of July 14, 1921.

No. 3567.

PANAMA RAILROAD COMPANY

versus

JAMES ROCK.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

Notice of Intention to Apply for Writ of Error.

Filed July 14, 1921.

UNITED STATES OF AMERICA:

In the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana.

No. 3567.

PANAMA RAILROAD COMPANY, Plaintiff in Error,

vs.

JAMES ROCK, Defendant in Error.

Now comes the Panama Railroad Company, by its Attorneys, Frank Feuille and Walter F. Van Dame, and *respectively* gives no-

tice that the plaintiff in error will apply for a writ of error in due course from the Supreme Court of the United States.

(Signed) FRANK FEUILLE,
(Signed) WALTER F. VAN DAME,
Attorneys for the Panama Railroad Company, Plaintiff in Error.

Petition for Writ of Error and Order Allowing Same.

Filed August 12th, 1921.

UNITED STATES OF AMERICA:

In the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisana.

No. 3567.

PANAMA RAILROAD COMPANY, Plaintiff in Error,

vs.

JAMES ROCK, Defendant in Error.

Petition for Writ of Error from the Supreme Court to the Circuit Court of Appeals for the Fifth Circuit and Order Allowing Same.

The Panama Railroad Company, plaintiff in error in the above numbered and styled cause, by its attorneys Frank Feuille and Walter F. Van Dame, respectfully represents unto the United States Circuit Court of Appeals for the Fifth Circuit that a judgment was rendered by said Court on April 15, 1921, in the above styled cause, affirming the judgment of the District Court of the Canal Zone, in favor of said defendant in error and against plaintiff in error, in the sum of three thousand dollars and costs; that this is a proper case to be reviewed by the Supreme Court of the United States upon writ or error, in conformity with Section 9 of the Act of Congress, approved August 24, 1912, entitled "An Act to provide for the opening, maintenance, protection and operation of The Panama Canal, and the sanitation and government of the Canal Zone," and commonly known as "The Panama Canal Act;" that the plaintiff in error believes that it is entitled to a reversal of this case, and is desirous that same be reviewed by the Supreme Court of the United States upon the assignment of errors which accompany this petition for a writ of error.

The premises considered, the plaintiff in error respectfully prays that a writ of error from the Supreme Court of the United States be allowed, and that a supersedeas issue upon the filing of a good and sufficient bond by the plaintiff in error, in conformity with the orders of the Court, and that an order of the Court be made fixing

the amount of security which the plaintiff in error shall give upon the said writ of error, and that upon the giving of such security, all further proceedings in this Court shall be suspended and stayed until the determination of said writ of error by the said Supreme Court of the United States.

PANAMA RAILROAD COMPANY,
Plaintiff in Error,

By FRANK FEUILLE AND
WALTER F. VAN DAME,
Its Attorneys.

The writ of error is allowed as prayed for, to operate as a supersedeas, and the plaintiff in error is hereby required to file a good and sufficient bond in the sum of Four thousand five hundred ($4,500.00) Dollars.

(Signed) R. W. WALKER,
Circuit Judge.

6th day of Aug. 1921.

Assignment of Errors.

Filed August 12th, 1921.

UNITED STATES OF AMERICA:

In the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana.

No. 3567.

PANAMA RAILROAD COMPANY, Plaintiff in Error,

vs.

JAMES ROCK, Defendant in Error.

Assignments of Error on Writ of Error from the United States Supreme Court.

Now comes the Panama Railroad Company, plaintiff in error, and assigns the following as errors upon which it will rely in the prosecution of the writ of error in the above entitled cause:

I.

The Court erred in sustaining the trial court in having overruled plaintiff in error's demurrer to defendant in error's complaint.

II.

The court erred in sustaining the trial court in having overruled plaintiff in error's motion for a directed verdict in its favor at the

conclusion of defendant in error's case, which motion was based on the following grounds:

(1) The evidence fails to show that the death of Rachel Rock was due to the negligence of the defendant company;

(2) Plaintiff's cause of action is one which does not survive under the laws of the Canal Zone;

(3) The evidence fails to show that any damages resulted to the plaintiff under the laws of the Canal Zone, by reason of the death of said Rachel Rock.

III.

The court erred in sustaining the trial court in having overruled plaintiff in error's motion for a directed verdict in its favor at the close of all the evidence, which motion was based on the following grounds:

(1) The evidence fails to show that the death of Rachel Rock was due to the negligence of the defendant company;

(2) Plaintiff's cause of action is one which does not survive under the laws of the Canal Zone;

(3) The evidence fails to show that any damages resulted to the plaintiff under the laws of the Canal Zone, by reason of the death of the said Rachel Rock.

VI.

The court erred in sustaining the trial court in having refused to give defendant company's Request for Instructions Number Two, which read as follows:

"You are instructed that under the laws of the Canal Zone you cannot allow the plaintiff anything by way of solatium for his grief and wounded feelings, or as a compensation for the mere loss of society or companionship, which he has sustained because of the death of his wife."

191

V.

The Court erred in sustaining the trial court in having refused to give defendant company's Request for Instructions Number Three, which read as follows:

"You are instructed that if after hearing all of defendant's and all of plaintiff's testimony adduced during the course of the trial you are of the opinion that the cause of the accident has not been explained and cannot be reasonably and logically deducted or inferred from all the testimony in regard to the wreck which you have heard, then in that event I charge you that the plaintiff has failed to establish the negligence of the company by a proper preponder-

ance and weight of the evidence, and your verdict must be for the defendant company."

VI.

The Court erred in sustaining the trial court in having refused to give defendant company's Request for Instructions Number Four, which read as follows:

"You are charged that if all the evidenced and testimony adduced by the plaintiff and all the evidence and testimony adduced by the defendant company has the effect of leaving you in doubt as to the negligence of the defendant company, then plaintiff has not proven negligence on the part of the defendant company, and your verdict must be for the defendant."

VII.

The Court erred in sustaining the trial Court in having refused to give defendant company's Request for Instructions Number Five, which read as follows:

"You are charged that the gravamen or gist of the case which you have been trying as jurors is the negligence or non-negligence of the defendant company, and if you are not satisfied in your minds that the defendant company was guilty of negligence then your verdict must be for the defendant company."

VIII.

The Court erred in holding as correct that part of the trial court's written charge to the jury appearing on page 6 thereof, which reads as follows:

"The law exacts of a railway company engaged in carrying passengers the highest practicable care for the safety of its passengers in the operation of its trains. And if you are convinced by the evidence in this case that the plaintiff's decedent was a passenger on defendant's train and was violently thrown from her seat in the coach and killed by reason of the train on which she was riding being derailed, and if you further find that no explanation thereof is made by the defendant at the trial of this case, the defendant's negligence and the decedent's freedom from contributory negligence are established. But if the defendant has made explanation satisfactory to you, and you are convinced from the evidence in the case that the defendant was not negligent, or that the plaintiff's decedent was guilty of contributory negligence, then in such case your verdict would be for the defendant."

IX.

The Court erred in holding as correct that part of the trial court's written charge to the jury appearing on page 8 thereof, which reads as follows:

"If the jury are reasonably satisfied from the evidence that the plaintiff's decedent on the 20th day of May, 1918, purchased from the defendant a railroad ticket by the terms of which the defendant company promised and agreed to and with the plaintiff's decedent in consideration of the payment unto defendant of the purchase price of said ticket to safely carry plaintiff's said wife, Rachel Rock, as passenger on a second-class coach or car of one of defendant's regular passenger trains from the city of Panama to and across the Canal zone to the city or town of Gatun, Canal Zone, and plaintiff's decedent duly tendered and presented said ticket to the said defendant, and defendant received said ticket and permitted and invited plaintiff's decedent aboard a second-class coach or car of the defendant's passenger train, to be carried as a passenger from the city of Panama aforesaid to the said city or town of Gatun, and that said Rachel Rock did go aboard defendant's train, and while riding to said city or town of Gatun the train of cars, or some of the cars thereof, ran off the track and plaintiff's said wife was killed thereby, then the plaintiff makes out a prima facie case for recovery, and is entitled to recover, unless the defendant reasonably overcomes this prima facie right of recovery by the evidence in the case."

X.

The Court erred in holding as correct that part of the trial court's written instructions to the jury appearing on page- 11 and 12 thereof, which reads as follows:

"If you believe from the evidence that defendant's train of cars in which plaintiff's decedent was being carried as passenger on the 20th day of May, 1918, was thrown from the track causing the death of plaintiff's decedent as alleged in his complaint, and the cause of such action is one in which the highest degree of practical care, skill and caution consistent with operating the road, the defendant could not have provided against, and the said train was not thrown from the track because of the mode and construction and repair of said track or by excessive speed, and not because of any fault or neglect whatever of the defendant, its agents or servants, then the jury should find for the defendant as to the injuries to the person of plaintiff's decedent in the petition complained of.

XI.

The Court erred in holding as correct the part of the trial court's written charge to the jury appearing on page 14 thereof, which reads as follows:

"The court instructs the jury that it is the undisputed evidence in this case that the plaintiff's wife was a passenger on defendant's car at the time and place complained of by plaintiff; the defendant having received plaintiff's wife on board of such train, the due obligation of the defendant to plaintiff's wife was to use the highest degree of care practical and known among prudent, skillful and

experienced men in that kind of business, to carry her safely, and a failure of the defendant (if you believe there was a failure) to use such highest degree of care would constitute negligence on its part, and defendant would be responsible for all injuries resulting to plaintiff and plaintiff's wife, if any, from such negligence, if any; and it is the undisputed evidence in this case that the car in which plaintiff's wife was riding together with other cars in said train operated by the defendant at the time and place alleged was derailed, and the plaintiff's wife was killed as the result of such derailment of the car in which she was riding. The presumption is that it was occasioned by some negligence of defendant, and the burden of proof is cast upon the defendant to rebut this presumption of negligence and establish the fact that there was no negligence on its part, and that the injury and death of the plaintiff's wife was occasioned by an inevitable accident, or by some cause which such highest degree of care would not have avoided."

X-.

The Court erred in holding as correct that part of the trial court's written charge to the jury appearing on pages 16 and 17 thereof, which reads as follows:

"The court instructs the jury that if you believe that the deceased, the wife of the plaintiff, met her death through the wrongful act of the defendant as charged in the complaint, in assessing damages, while you must assess with reference to pecuniary injuries sustained by the plaintiff in consequence of the death of his wife, you are not limited to loss actually sustained at the precise period of her death, but may include all prospective loss provided they are such as the jury believe from the evidence will actually result to the plaintiff as proximate damages arising from the death of his wife. And in determining the damages sustained by the husband you have the right to take into consideration the pecuniary loss, if any, sustained by him in being deprived of the services of his wife.

"It is difficult to adduce direct evidence of the exact pecuniary loss occasioned the plaintiff by the death of his wife, or to show the exact value of her services, and you are committed to determine the question of damages from your own observation, experience, and knowledge conscientiously applied to the facts and circumstances of the case which have been detailed to you by the witnesses in the trial of this case. The age of plaintiff's wife, the health she enjoyed, the money, if any, she was making by her labor, and her habits are data from which you may argue how long she would probably live and work, and what her life would be worth to her husband in its pecuniary value. And in assessing damages sustained by the plaintiff you should allow such pecuniary damages which were the direct result of the death of his said wife.

"The measure of damages in this case is the present value of the amount of money which the plaintiff, during the continuance of said wife's life, would have received from her had she lived. The

present value of a sum of money payable in the future is what that sum is worth if paid presently,—paid now. For example, the present value of $1.00 at 6% at the end of one year is found by dividing $1.00 by $1.06; and the present value of $1.00 at the end of two years is found by dividing $1.00 by $1.12; which process you may follow throughout your calculation, if you desire, but are not required to follow this precise method. Having, from the evidence, fixed as accurately and as fair as you possibly can, the number of dollars representing the yearly earnings of deceased, from all the evidence, her expectancy, (that is, the number of years which she would probably have lived), you could by multiplying one of these numbers by the other determine approximately what would have been the gross amount of her earnings of her whole life time, that is, from the time of her death. This gross amount, when ascertained would, of course, have to be reduced to its present value; that is to an amount which, paid down, would be just and legal cash equivalent of such gross amount,—the longer the life the greater would be the difference in these respective sums. If you pursue the course indicated and arrive at the gross amount in the manner which has just been explained to you it will then be incumbent upon you to make the necessary calculation for ascertaining its present cash value, and you can do this in the manner pointed out in this instruction, or by any other proper and legal method."

PANAMA RAILROAD COMPANY,
A CORPORATION,
Plaintiff in Error,
By FRANK FEUILLE AND
WALTER F. VAN DAME,
Its Attorneys.

Bond on Writ of Error.

Filed August 12th, 1921.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals for the Fifth Circuit.

No. 3567.

PANAMA RAILROAD COMPANY, Plaintiff in Error,

versus

JAMES ROCK, Defendant in Error.

Bond on Writ of Error and Approval Thereof.

Know all men by these presents that we, the Panama Railroad Company, a corporation, as principal and the Globe Indemnity Company as surety, are held and firmly bound unto James Rock, of Colon, Republic of Panama, in the full and just sum of Four

Thousand Five Hundred dollars ($4,500.00), to be paid unto the said James Rock, his certain attorneys, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 3rd day of August in the year of our Lord, one thousand nine hundred twenty-one.

Whereas, lately at a term of the United States Circuit Court of Appeals for the Fifth Circuit, in a suit pending in said Court between said Panama Railroad Company, plaintiff in error, and James Rock, defendant in error, the said Court, through Circuit Judges Bryan and King, Circuit Judge Walker dissenting, affirmed the judgment of the District Court of the Canal Zone, which said judgment was rendered against the said Panama Railroad Company and in favor of the said James Rock in the sum of three thousand dollars ($3,000.00) United States currency, together with costs, and the said Panama Railroad Company having applied to the Supreme Court of the United States for a writ of error to review the said judgment of the said Circuit Court of Appeals for the Fifth Circuit, having obtained the same and having filed a copy thereof in the office of the Clerk *of the Clerk* of the said United States Circuit Court of Appeals for the Fifth Circuit and a citation having been directed to the said James Rock, the defendant in error, citing and admonishing him to be and appear at a Supreme Court of the United States of America, at Washington, within thirty days from the date thereof;

Now, therefore, the condition of the above obligation is such that if the said Panama Railroad Company shall prosecute its said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

THE PANAMA RAILROAD COMPANY,
A CORPORATION,
(Signed) By MONTE M. LEMANN,
Its Attorney-in-Fact.
GLOBE INDEMNITY COMPANY,
Surety,

[Seal of the Globe Indemnity Company, New York.]

(Signed) By WLLIAM H. KLINESMITH,
Its Attorney-in-Fact.

Bond approved and stay of execution ordered, this 10th day of August, A. D. nineteen twenty-one.

(Signed) R. W. WALKER,
Circuit Judge.

Clerk's Certificate.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 164 to 195 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 3567, wherein the Panama Railroad Company is plaintiff in error, and James Rock is defendant in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 163 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

I further certify that the certain blue print, marked "Defendant's Exhibit B," forwarded to this Court in the original, pursuant to Stipulation copied at page 161 of this record, is transmitted herewith in the original to the Supreme Court of the United States.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 16th day of August, A. D. 1921.

[Seal of United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

UNITED STATES OF AMERICA:

In the Supreme Court of the United States.

PANAMA RAILROAD COMPANY, Plaintiff in Error,

vs.

JAMES ROCK, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit

Court of Appeals before you, or some of you, between the Panama Railroad Company, plaintiff in error versus James Rock, defendant in error, a manifest error hath happened, to the great damage of the said Panama Railroad Company, plaintiff in error, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 6th day of August, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal of United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States
Circuit Court of Appeals.

Allowed by:
R. W. WALKER,
Circuit Judge.

I hereby certify that a true copy of the within Writ has this day been lodged in the Clerk's office for the use of the defendant in error.

Dated this 12th day of August, A. D. 1921.

[Seal of United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States
Circuit Court of Appeals.

[Endorsed:] No. 3567. In the United States Circuit Court of Appeals, Fifth Circuit. Panama Railroad Company, Plaintiff in Error, versus James Rock. Writ of error. Filed 12 day of August, 1921. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals.

Endorsed on cover: File No. 28,442. U. S. Circuit Court Appeals, 5th Circuit. Term No. 487. Panama Railroad Company, plaintiff in error, vs. James Rock. Filed August 22d, 1921. File No. 28,442.

BRIEF OF PLAINTIFF IN ERROR

SUPREME COURT OF THE UNITED STATES

No. 11

THE PANAMA RAILROAD COMPANY,
Plaintiff in Error

versus

JAMES ROCK,
Defendant in Error

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPREME COURT OF THE
UNITED STATES

VOL. 11

SUBJECT INDEX

PANAMA RAILROAD COMPANY, *Plaintiff in Error*,

vs.

JAMES ROCK, *Defendant in Error*.

SUPREME COURT OF THE UNITED STATES, No. 11, OCTOBER TERM 1928.

ANALYSIS OF DECISION OF CIRCUIT COURT OF APPEALS—Continued.

CASES CITED.

SUPREME COURT OF THE UNITED STATES

THE PANAMA RAILROAD COMPANY,
Plaintiff in Error,

vs. No. 11.

JAMES ROCK,
Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

Brief of Plaintiff in Error.

STATEMENT OF THE CASE.

Plaintiff in error is a corporation chartered under the laws of the State of New York and, among other things, is now, and for a long time has been, engaged in the business of owning and operating a line of railroad in and through the Canal Zone, and Plaintiff in Error has for a long time been and is now a common carrier of freight and passengers for hire. On the evening of May 20, 1918, Plaintiff in Error's passenger train No. 8 left the City of Panama, the southern terminus of the railroad, for Colon, the northern terminus, and during its transit across the Isthmus, was partially wrecked between Summit and Gamboa Stockade stations at 5.55 p. m. Rachel Rock, colored, aged 38 years, wife of James Rock a colored West Indian, was killed. On April 10, 1919, James Rock began a suit in the United States District Court of the Canal Zone to

recover damages, as "the only surviving heir at law of Rachel Rock" (Tr., p. 2), on account of the loss of her services, company, society, and because of the injuries suffered by her. Plaintiff in Error demurred to the defendant in error's complaint on the ground that there was no statute in force within the Canal Zone conferring an action for damages for wrongful death nor was there in force a statute specifying the party entitled to bring such an action. (Tr., p. 8). The trial court overruled the demurrer, and the usual exceptions were taken. The case was tried before a jury on May 13 and 14, 1920, at which time motions for directed verdict were made on the ground, among others, stated in the demurrer. The motions were overruled and exceptions were saved. A verdict of $3,000 was returned for the Defendant in Error (plaintiff in trial court). Appeal was taken to the Circuit Court of Appeals, Fifth Circuit, on various assignments of error among which was that of the demurrer. On April 15, 1921, the Circuit Court of Appeals, in an opinion by Judges Bryan and King (Tr., pp. 168–173), held that the laws of the Canal Zone provide for liability for death by wrongful act, and for the enforcement of such liability. Judge Walker filed a dissenting opinion (Tr., p. 173). Appeal was taken to the Supreme Court, and the case is before this Tribunal on a stipulation that it be presented in briefs without oral argument.

ASSIGNMENTS OF ERROR.

The Plaintiff in Error has made ten assignments of error, all of which it hereby waives, except No. 1, and section 2 of Nos. 2 and 3; the same being as follows:

I.

The Court erred in sustaining the trial court in having overruled Plaintiff in Error's demurrer to Defendant in Error's complaint.

II.

The court erred in sustaining the trial court in having overruled Plaintiff in Error's motion for a directed verdict in its favor at the conclusion of Defendant in Error's case, which motion was based on the following grounds:

* * * * * * *

(2) Plaintiff's cause of action is one which does not survive under the laws of the Canal Zone;

* * * * * * *

III.

The court erred in sustaining the trial court in having overruled Plaintiff in Error's motion for a directed verdict in its favor at the close of all the evidence, which motion was based on the following grounds:

* * * * * * *

(2) Plaintiff's cause of action is one which does not survive under the laws of the Canal Zone;

* * * * * * *

In fact Plaintiff in Error stands before this Court on the ground stated in its original demurrer (Tr., p. 8), as follows:

" * * * under the substantive law of the Canal Zone there is no statute or law which confers an action for damages for wrongful death, nor does any statute or law specify the party who would be authorized to sue and recover therefor. (Ursulina Lebert *vs.* Pacific Mail S. S. Co., District Court of the Canal Zone; and,249 Fed., 349).

THE LAW IN QUESTION.

It is conceded by the Defendant in Error that the action was brought under the provisions of Section 2341 of the Civil Code of the Canal Zone, which reads:

He who shall have been guilty of an offense or fault, which has caused another damage, is obliged

to repair, it without prejudice to the principle penalty which the law imposes for the fault or offense committed.

RULE IN THE BOSSE CASE.

In the case of Bosse *vs.* Panama Rail Road Company (249 U. S., p. 41), this Court considered the very article of the Civil Code of the Canal Zone now in question, and in the course of its decision stated:

> * * * In the matter of personal relations and duties of the kind now before us the supposed interpretation would not be a law with which the present "inhabitants are familiar," in the language of the President's order, but on the contrary an exotic imposition of a rule opposed to the common understanding of men. For whatever may be thought of the unqualified principle that a master must answer for the torts of his servant committed within the scope of his employment, probably there are few rules of the common law so familiar to all, educated and uneducated alike.
>
> As early as 1910 the Supreme Court of the Canal Zone announced that it would look to the common law in the construction of the Colombia statutes. Kung Ching Chong *v.* Wing Chong, 2 Canal Zone Sup. Ct. Rep. 25, 30, and following that announcement, in January, 1913, held that "at least so far as the empresarios of railroads are concerned" the liability of master for servant would be maintained in the Zone to the same extent as recognized by the common law. Fitzpatrick *v.* Panama Railroad Co., 2 Canal Zone Sup. Ct. Rep. 111, 121, 128. The principle certainly was not overthrown by the Act of 1912. It is not necessary to dwell upon the drift toward the common law doctrine noticeable in some civil law jurisdictions at least, or to consider how far we should go if the language of the Civil Code were clearer

than it is. It is enough that the language is not necessarily inconsistent with the common law rule. * * *

At no stage in the consideration of the instant case has it been contended that there is specific statutory provision in the Canal Zone for recovery on account of death. It is the contention of Appellant in Error that the rule in the Boese case has the effect of throwing the Canal Zone back upon the common law where a specific provision for remedy in tort is lacking.

ANALYSIS OF DECISION OF CIRCUIT COURT OF APPEALS.

The decision of the Circuit Court of Appeals (Tr., pp. 169–173) deals with the question in two parts. In the first part the Court holds that the general law of tort in the civil law covers death by wrongful act, and from this erroneous supposition deduces that the law of the Canal Zone must therefore provide for damages in such cases. On the very statement of its position the Court shows that there is doubt. Plaintiff in error contends that *in case of any doubt* resort must be had to the common law interpretation, as was done in the Lebert case (249 Fed., 349); and as provided in the Boese case.

The Circuit Court of Appeals quotes from Grotuis and from "Rutherford's Institutes." These quotations are apparently made from the case of Hubgh v. Railway Co., 6 La. Annual, 509, Book 23 of La. Annotated Reports. Here a case similar to the instant case is considered from the standpoint of the civil law. It is distinctly pointed out that Grotuis was telling what he considered a moral duty, not a provision of the law; and that Rutherford also was expressing his own

opinion, not stating the law. In "The Harrisburg" (119 U. S., p. 213), the Supreme Court quotes this case approvingly:

> It is also said that such (the rule that action survived for death)[1] was the civil law, but this is denied by the Supreme Court of Louisiana * * * where Chief Justice Eustis considers the subject in an elaborate opinion after full argument. A reargument of the same question was allowed in Hermann *v.* R. R. Co., 11 La. Ann., p. 5, and the same conclusion reached after another full argument * * * * *

The quotation which the Circuit Court of Appeals makes from the Hermann case is misleading. It should have been continued as follows:

> The authorities on which the decision in the case of Hubgh was based have been subjected to the severest tests of examination and criticism, and were the question *res nova* we should feel great difficulty in arriving at a satisfactory conclusion. Our predecessors, however, have held that this article of the Civil Code was not introductory of a new rule, but merely the enunciation of a principle well known and often acted upon under the jurisprudence of the country prior to the introduction of the new civil code. They have also held that under the former jurisprudence of the country, no action like the present (Act of March 15, 1855)[1] was given the surviving wife and children. Whatever difficulties the learned argument of plaintiff's counsel may have created in our minds, we do not think in a matter merely doubtful we are called upon to overrule, or are justified in disregarding a decision of our predecessors, pronounced after a full consideration of the subject, and by men who from their long experience and great learning and acquirements, must not only have been thoroughly acquainted with the jurisprudence of the

[1] Parenthesis is by Appellant in Error.

> country, but also with the general sentiment of the profession upon a subject which must have occasionally engaged the attention of almost every practicioner.

The Circuit Court of Appeals quotes from book 7, Title 15, Law 3 of Las Siete Partidas. But the quotation is part of a title that refers *exclusively to damages to property*, and has no bearing on damages for the death of a human being (slaves are included but only as property). The original Spanish title was "De los Daños que los Omes o las Bestias fazen en las Cosas de Otro, de qual Natura quier que sean." ("Las Siete Partidas," Madrid, 1844, Official Text.) Moreau and Carleton's Partidas, New Orleans, 1820, Vol. 2, p. 1198, translates this title as follows: "Of all kinds of damages, which Men or Beasts do to the Property of other Persons." Law 6 of this title provides for certain torts to persons, but has no bearing on the survival of action for, or damages due to loss of services on account of death.

The Circuit Court of Appeals states "There is no question that the right exists under the Code Napoleon." Plaintiff in Error questions this dictum, because we find no substantive provision of the Code Napoleon to this effect (The French Civil Code, Henry Cachard, 1895, published by Stevens and Sons, Ltd., London, Sections 1382 to 1386). If such an action is provided in the French Code it is found in a Code of Procedure, that is in a statute. The Canal Zone Code of Civil Procedure makes no provision for such an action.

The Circuit Court of Appeals refers to The Harrisburg (119 U. S., p. 199). Plaintiff in Error submits that this case bears out its contention, viz.:

> Since, however, it is now established that in the courts of the United States no action at law can be maintained for such a wrong in the

absence of statute giving the right, and it has not been shown that the maritime law, as accepted and received by maritime nations generally, has established a different rule for the government of the courts of admiralty from those which govern courts of law in matters of this kind, we are forced to the conclusion that no such action will lie in the courts of the United States under the general maritime law. The rights of persons in this particular under the maritime law of this country are not different from those under the common law, and as it is the duty of courts to declare the law, not to make it, we can not change this rule.

The Circuit Court of Appeals states that the general law of torts as found in the Canal Zone is found also in the Codes of Chile, Colombia, Cuba, Porto Rico and the Philippines. Yes, but recovery for death by wrongful act exists under this law of tort only where specially provided by statute. It is true also that a general law of tort existed at common law, but survival of an action for death did not exist at common law.

Plaintiff in Error admits that recovery may be had in Spain, Cuba, and Porto Rico, and since September 30, 1917, in the Republic of Panama, in such a case as is the one under discussion, but only for the reason that the statutes of those jurisdictions are entirely dissimilar from those in force within the Canal Zone.

The Civil and Penal Codes of Spain were by royal decree extended to Porto Rico and Cuba on July 31, 1889, and May 23, 1879, respectively, and both codes remained in effect in Porto Rico until July 1, 1902, when said codes were superseded by those enacted by the Porto Rican Legislative Assembly. In respect to the right to sue for death by negligent act, however, the Porto Rican Federal Court in Torres vs. Ponce R. & L. Co., 1 Porto Rico Fed. R. 476, held that the code enacted by the Legislature of Porto Rico in 1902, did not

render inapplicable the construction by the Supreme Court of Spain of the Spanish Civil Law applicable to Porto Rico. The reason for permitting such a recovery in Spain, Porto Rico, and Cuba, is pointed out by Judge Holt in Barrero *vs.* Compañía Anonyma de la Luz Electrica, 1 P. R. Fed. 144, decided in 1903, but arising prior to the date of the enactment of the Porto Rican Code of 1902, in the following terms:

> "Whatever the rule may be, however, the law of Porto Rico as derived from Spain must be decisive of the question in this jurisdiction. The local legislature has not provided for the case.
>
> "The Civil Code of Porto Rico, Article 1902, provides: 'A person who by an act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage so done.' There is no express provision as to the right to sue in case of death. Under the practice formerly existing in Porto Rico, in a proper case the law provided for, not only criminal proceedings, but for indemnification on account of the unlawful act to those entitled to it, all in the same proceeding; but those entitled to a civil indemnity could decline to proceed with the criminal action, and yet sue for civil liability. Article 16 of the Penal Code provided that one liable for a misdemeanor was also liable civilly. Both the penal and civil liability could be determined in the same proceeding; and Article 123 provided: '*The action to demand restitution, reparation, or indemnification is also transmitted to the heirs of the person injured.*' The Supreme Court of Spain in the case of Juana Alonzo Celada against Manuel Chacon and Cándido Lara, in December, 1894, held that under the then existing Spanish law the action could be maintained. This court was the supreme tribunal as to the construction of Spanish law and the civil law so far as existing and applicable to Spanish possessions. Regard should be had, in my opinion, to its authority,

and in view of this provision of the law and of this ruling, the demurrer herein is overruled."

There is no section of the penal code of the Canal Zone even approximating the provisions of Section 123 of the penal code of Porto Rico and Spain, above-quoted by Judge Holt. Furthermore, Judge Holt's opinion in the aforementioned case is weakened by the fact that the Porto Rican legislature, notwithstanding said opinion, thought it necessary when adopting the present code of civil procedure for that island to provide specifically therein in Sections 60 and 61 for the maintenance of actions for damages on the part of a mother or father for the injury or death of their minor child, and on the part of the heirs or personal representatives of a person, not being a minor, for the death of such person, against the person causing the death. The present code of civil procedure of Porto Rico was adopted July 1, 1904, or a little more than a year subsequent to the date of Judge Holt's opinion in the Barrero case.

In the trial court's opinion on demurrer it is stated (Tr., p. 25) that the case of Belen Requena de Mollina *vs.* San Juan Light and Transit Company, IV Porto Rico Federal Rep. 356, 361 (wherein the court allowed a widow to recover under Section 1902 of the civil code of Porto Rico because of the death of her husband, caused by the negligent act of defendant, and which death occurred on April 1, 1908), was affirmed by the Supreme Court of the United States in 224 U.S., 89. The said statement of the Court *a qua* is misleading, for the reason that at the time the case was tried by the United States District Court for Porto Rico, Section 61 of the Code of Civil Procedure of Porto Rico, which code was adopted on July 1, 1904, and which section specifically permits such a recovery by the heir or personal representative of the deceased, was, naturally, in force.

The aforementioned section of the code of civil procedure of Porto Rico reads as follows:

> "Section 61. When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section such damages may be given as under all the circumstances of the case be just."

The point involved, therefore, when the case was before the Supreme Court on writ of error (San Juan Light Co. *vs.* Requena, 224 U. S., 89) was not whether an heir at law could recover for the wrongful death of his decedent under Article 1902 of the Porto Rican civil code, but instead, was mainly whether or not the trial court had in its instructions properly applied the doctrine of *res ipsa loquitur*.

The laws of the Canal Zone are widely different from those of Spain and Porto Rico, as were also those of the Republic of Panama up to the time of the adoption of its new civil code on September 30, 1917. Since the last-mentioned date, and under the provisions of its present code, the courts of the Republic of Panama have allowed, in at least one instance, a recovery by a mother for the wrongful death of a major son upon whom she was actually dependent for support. However, under the provisions of the civil code of Colombia, which is up to this time also that of the Canal Zone, and which code was also, as above stated, in effect in the Republic of Panama from the birth of that Republic up to September 30, 1917, there are no decisions of either Colombian or Panamanian courts allowing a recovery in an action for wrongful death under Section 2341 thereof.

METHOD OF ENFORCING LIABILITY.

The second part of the decision of the Circuit Court of Appeals is based upon the erroneous assumption that, because there is an action for tort there is also an action for wrongful death. The point made by Plaintiff in Error is that the old system of adjudicating private damages in a public prosecution of a felony was not made a part of the law of the Canal Zone in 1904. The whole idea is well-expressed by the Supreme Court of Panama, October 5, 1918, in an action for wrongful death, as follows:

> A penal action springs from every penal offense against the persons who appear to be responsible, and also the civil action for the restitution of the thing, the reparation of the damage done, and the indemnification for the injuries caused by the penal act. The civil and criminal action may be instituted jointly, and so instituted they should be tried and decided in the same proceeding in which the corresponding criminal procedure shall be observed. The civil action may also be instituted separately. Neither the pardon nor the extinguishment of the penal action prejudices the civil action of the offending party or parties, to demand a restitution of the thing, the reparation of the damage caused, and the indemnity for the injury suffered. Neither does the sentence of acquittal affect the case unless the acquittal is based on the fact that the damage done resulted from a lawful act executed without any imprudence whatever; that is to say, by mere accident or fortuitous cause, among other things. Neither does the extinction of the civil action carry with it the penal action that arises from the same offense or fault. The absolving sentence in a suit instituted to enforce the civil action is no obstacle to the exercise of the corresponding penal action.
>
> The legal precepts which have been condensed in the preceding exposition demonstrate beyond

any rational doubt that the new judicial code is a complete departure from the system adopted by the legislature of Colombia that was in force in the Republic of Panama until the 30th day of September, 1917, *according to which the civil action instituted for the reparation of damages could not be commenced separately unless judgment had been previously rendered in the criminal case*, and establishes the system by which the injured party is given full liberty to make separate civil demand before or after the penal action has been resolved, or jointly with that action. Orozco *v.* Panama Electric Co., Registro Judicial de Panama, Vol. XV., No. 94. * * *

The system referred to by the Supreme Court of Panama as in effect prior to September 30, 1917, is the old Colombian system; and if there were any provision in the Canal Zone laws for an action for damages for death by wrongful act, it would be found in this provision of the old penal code. But the penal code of Colombia was not continued in the Canal Zone in 1904.

But Plaintiff in Error is not reverting to a question apparently settled in Bosse *v.* Panama Railroad (249 U. S., 41) and Toppin *v.* Panama Railroad (252 U. S., 308). It is simply quoting an opinion about the old Colombian law which bears upon its point that, *neither in the civil code or the code of civil procedure of the Canal Zone, nor in any laws passed by Congress, or made by Executive Order, is there a statute that gives a right of action for death by wrongful act or that indicates an intention of authorizing such an action by indicating by whom such action could be maintained, or to whom its benefits should accrue.*

DECISION IN THE LEBERT CASE.

In the case of Ursulina Lebert *v.* Pacific Mail Steamship Co. the U. S. District Court of the Canal Zone (Jackson, J.) held that no action for wrongful death

survived in the Canal Zone, and this decision was sustained by the Circuit Court of Appeals (249 Fed., 349). Judge Jackson in his opinion said, among other things:

"The question therefore arises whether there exists in the Canal Zone, or in the laws of Colombia applicable to the Canal Zone any express statutory provision granting the right to maintain a civil action for wrongful death. The code of civil procedure of the Canal Zone fails to recognize such right. Section 126 of the code *supra* provides:

> 'If a person entitled to bring an action, die before the expiration of the term limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives after the expiration of that time, and within one year from his death.'

"This is the only section of the code of civil procedure that approximates the question at issue, and this clearly contemplates a cause of action that survives, and, as before stated at common law, an action for wrongful death did not survive but died with the party sustaining the injury.

"The only statute in force in the Canal Zone upon which plaintiff in this case could possibly predicate a right of recovery is contained in Article 2341 of the civil code, which reads as follows:

> 'He who shall have been guilty of an offense or fault, which has caused another damage, is obliged to repair it, without prejudice to the principle penalty which the law imposes for the fault or offense committed.'

"But it will be noted that this statute does not expressly confer an action for wrongful death, nor does it specify the party who would be authorized to sue and recover therefor. In England and in all the States of the Union all statutes authorizing

a recovery in such actions expressly provide the persons for whose benefit such actions may be instituted. It is customary to provide that the action may be maintained for the benefit of the surviving widow or children or husband or father, or brothers or sisters. In some States the administrator is allowed to sue as such for and on behalf of the general estate, while in others it is specifically limited to certain designated heirs. *It may be said that it is necessary that there should be such a specific designation of beneficiaries for otherwise an action for the wrongful death might be brought by any one, even by a friend or an acquaintance of the deceased by proving that he or she had cherished feelings of friendship or affection for the deceased, and that they had in some way been financially damaged by his death.*

"The authorities which I have recently examined show conclusively that the right of action is not only strictly one of statutory origin but that *it must be strictly limited to the beneficiaries named in the statute, and that no right of action can be maintained except by those expressly and specifically named.* From this it would seem to follow conclusively that where there is no such statute there is no such right of action.

"In 1825 there was in force and effect in the State of Louisiana an act which provided:

> 'Every act whatever of man which causes damages to another obliges him by whose fault it happened to repair it.'

"And in Hubgh *vs.* New Orleans, etc., Railroad Company, 6 Louisiana Ann., 498, decided in 1851, it was held that this article did not give to any surviving relative a cause of action for damages for personal injuries resulting in death. It was there observed that an action for damages for the killing of a human being did not exist in common law nor in the Roman or Spanish laws, in which the provisions of the article of the code were found.

"In the case of Joseph Flash vs. The Louisiana Western R. R. Co., decided by the Supreme Court of Louisiana on April 12, 1915, and reported in Lawyers' Reports Annotated, 1916 E., p. 112, it was held that the right of action for damages for the death of a human being is in derogation of common right, and can not be extended by implication to other surviving relations than those to whom it is granted expressly by statute.

"Although Act No. 110 of 1908, amending Article 2315 of the Louisiana civil code, so as to provide that a right of action for damages shall survive in favor of the surviving children or widow, father or mother, brothers or sisters, in case of the death of the injured person, concludes with this declaration: 'The survivors above-mentioned may also recover the damages sustained by *them* by the death of the parent or children or husband or wife or brothers or sisters as the case may be, the husband has no right of action for damages for the death of his wife, because he is not one of the survivors mentioned. On page 117 of this case the Court, speaking through Mr. Justice O'Neill said:

> 'This Court has never extended by implication the right of action conferred by statute upon the survivors named either for the damages sustained by the deceased person, *or for the grief or loss suffered by the survivors.*
>
> 'For example, it has been held that the designation of the survivors as minor children in Act 71 of 1884 should be construed strictly, and does not include grandchildren, notwithstanding the last article of our civil code provides that the term "children" wherever used therein means "grandchildren, great-grandchildren, and all other legitimate direct descendents." * * * In Lynch vs. Knopp, 118 La., 611, it was held that the term "surviving mother" in the statute

> of 1884, meant only the mother of a legitimate child and not the mother of an illegitimate child * * * And in Vaughn *vs.* Lumber Co., 119 La., 61, it was held that the term "widow" in Act 71 of 1886, meant the surviving lawful wife, and did not include the putative wife, even though she married in good faith and in ignorance of the fact that the other party to the ceremony was already married to another woman.'

"These Louisiana cases show with what strictness statutes granting a right of action for compensation for death by wrongful act are construed, and, *as frequently stated, the decisions of this court should be guided by and should approximate as nearly as possible to the decisions of the Louisiana courts because of the fact that here and in Louisiana the civil code prevails.* In the case of Deham *vs.* the Mexican National Railroad Co., decided by the Court of Civil Appeals of Texas, April 6, 1893, reported in *South Western Reporter*, Volume 22, it was decided that 'Since the laws of Mexico did not give a right of action for death caused by wrongful act to another no action can be maintained in Texas for the negligence of a railroad within that country which resulted in the death of one of its employees, though the death occurred within this State.' It would seem that in this case the Court of Appeals of Texas denied the right to recover although the death occurred in Texas, *and although there was in effect in the Republic of Mexico, where the injury which caused the death occurred, a law substantially similar to that which is relied upon by the plaintiff in the present case.* And the same view appears to have been taken by the Common Pleas Court of New York City and County in the case of Geohegan *vs.* the Atlas Steamship Company decided April 23, 1893, which was an action brought in New York for the wrongful death of a party occurring in the waters of the Republic of

Colombia, *and the New York courts denied the right to maintain such action for the wrongful death occurring as it did in the jurisdiction of Colombia where there was in existence precisely the same statute which is relied upon by the plaintiff in this case, as the real basis for recovery herein.* It was considered by Judge Pryor in deciding this case that there was an absence of any statute affording such a right of action, and, as stated, the statute of Colombia was in all respects similar to the statute relied upon herein.

"It may be added that this seems to be the view not only of the courts but of learned law writers upon the subject. In an article written by Judge Harrington Putnam of the Appellate Division of the Supreme Court of New York, published in *Case and Comment* of July, 1915, there appears the following:

> 'More difficult and unsatisfactory problems must arise when our commerce is extended through the Panama Canal and reaches toward South America. Extensive passenger traffic already converges at the Canal Zone."

"And then, referring to the Colombian case above cited and one other, the writer states:

> 'Both these injured sufferers presumably sought to find their remedy in a local statute and discovered nothing applicable * * * Hence, it would seem certain that a vessel from Mexico or one from the United States of Colombia can not now be subject to any such liability in our Federal Courts where a fatality occurs on the high seas, or probably within the waters of the Canal Zone, although the system of compensation to workmen in the Zone by Executive Order recognized a liability for an employee's death, that does not apply to a person not in the Government employ.

'Louisiana, in 1884, passed a death statute that gave a recovery to survivors. But their courts administering the civil law declare this act created a remedy theretofore unknown.'

"The author then cites the case of the Van Amburg *vs.* Vicksburg, etc., R. R. Co., 37 La. Ann. 650, as follows:

'Legislation and jurisprudence have combined to perpetuate the extraordinary doctrine that the life of a free man can not be made the subject of valuation, and under the domination of that dogmatic utterance, made earlier than the Roman Digest, reproduced therein, and echoed by the courts of all countries from then till now, the singular spectacle has been witnessed of courts sanctioning damages for short-lived pains, *and refusing them for a life-long sorrow and the pecuniary losses consequent upon the death of one from whom was derived support, comfort, and even the necessary stays of life.* Legislation has at last come to the relief of future sufferers. The act of 1884 applies the remedy that the public conscience has long demanded, but it has missed application to this case only by a few days.'

"And concludes with the following significant and well-considered statement:

'As Louisiana is under the French civil law, this admission that their system had given no remedy for loss of life suggests a like condition in the South American States under the Spanish civil law. Certainly an action for death caused by their vessels, in our Federal Courts, would be a futile and lame pursuit, judging by the two cases as to Colombia.'"

Judge Jackson, in the opinion above quoted, calls attention to the fact that Sec. 2341, Canal Zone code,

upon which defendant in error relies to recover, does not expressly confer a right of action for wrongful death, nor does it specify the party who would be authorized to sue and recover therefor.

The fallacy and danger of allowing defendant in error, who sued as the "only surviving heir at law," to recover in the instant case in the absence of a statute authorizing the maintenance of an action for wrongful death, of a statute specifically designating those entitled to bring such an action and of a statute designating those for whose benefit such action shall be brought, is illustrated by the following: Defendant in error's decedent, Rachael Rock, at the time of her death, had a son of the age of 18 years, born on the Island of Jamaica, named Cyril Smith, who on July 9, 1917, was sentenced to a term of one year in the Gamboa penitentiary upon being found guilty in the Balboa Division of the District Court of the Canal Zone of the offense of forgery in connection with a $9 post-office money order. Because of the fact that the convict's mother, Rachael Rock, resided in the Canal Zone, Cyril Smith was not deported to the country of his origin after the expiration of his term in the penitentiary as is usual in the cases of ex-convicts not born within what is now the Canal Zone, and he is up to this time still a resident of the Canal Zone. Defendant in error, James Rock, therefore, was not his decedent's "only surviving heir at law" as allegod in his complaint, and under the theories applied by the trial court to this cause Cyril Smith, whether legitimate or illegitimate, within the statutory time of attaining his majority, may institute suit against the Plaintiff in Error to recover the damages sustained by him because of the wrongful death of his mother, which applies also *ad infinitum* to as many other minor children as may have survived Defendant in Error's decedent.

From the foregoing and from the decision in the Bonse case it is clear that common law doctrines and principles are to be looked to in construing any particular section of the Civil Code of the Canal Zone, unless the provisions of such particular section are in themselves hostile to the application of such doctrines and principles, in view of which Section 2341 of the Civil Code of the Canal Zone no more confers a right of action upon an heir at law than upon a personal representative because of the death by wrongful act of his decedent.

SUMMARY OF DECISION OF CIRCUIT COURT OF APPEALS.

The decision of the Court may be summed up in two sentences quoted from its opinion:

> * * * the cases are to the effect, nevertheless, that civil suits lie for injuries; and if they lie for injuries then they do for death because all actions for damages, whether for injury or death, are based upon this statute.
> * * * * * * *
>
> It follows therefore that on February 26, 1904, when the President issued his proclamation, the laws of Panama provided for liability for death by wrongful act * * *

Plaintiff in Error respectfully submits to the contrary:

(1) The Civil Code, the Code of Civil Procedure and all other laws of the Canal Zone contain no provision for recovery on account of death by wrongful act.

(2) The dissenting opinion of Judge Walker in this instant case, from which the following is quoted:

> No fact or circumstance has been called to our attention which indicates that while the above set out Article 2341 of the Civil Code was in force in Panama and Colombia prior to the acquisition

of the Canal Zone by the United States it was understood or administered as having the effect of giving a civil right of action for the death of a human being caused by the wrong or negligence of another. So far as the writer is informed, no court or commentator whose opinion on the subject would be entitled to weight has expressed the opinion that that provision, standing by itself, gives such a right of action. The only disclosed recognition of the existence of such a right of action as a part of the law of Panama was after the United States acquired dominion over the Canal Zone and was based on enactments which have not become part of the law of the Canal Zone.

(3) An aphorism of the Supreme Court in the case of The Harrisburg, supra:

* * * It is the duty of courts to declare the law, not to make it.

WALTER F. VAN DAME,
Attorney for the Panama Rail Road Company,
Plaintiff in Error.

BRIEF OF DEFENDANT IN ERROR

SUPREME COURT OF THE UNITED STATES

No. 11

THE PANAMA RAILROAD COMPANY,
Plaintiff in Error

versus

JAMES ROCK,
Defendant in Error

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPREME COURT OF THE UNITED STATES

No. 11

INDEX

SUPREME COURT OF THE UNITED STATES

PANAMA RAILROAD COMPANY, *Plaintiff in Error,*

vs.

JAMES ROCK, *Defendant in Error.*

No. 11, October Term, 1924.

SUPREME COURT OF THE UNITED STATES

THE PANAMA RAILROAD COMPANY,
Plaintiff in Error,

vs.

JAMES ROCK,
Defendant in Error.

No. 11

STATEMENT OF THE CASE.

This is a writ of error to the United States Circuit Court of Appeals for the 5th Circuit to review a judgment affirming a judgment of the District Court of the Canal Zone, in favor of the defendant in error, in an action for damages personally sustained by him by reason of the negligent killing of his wife in a derailment accident on a passenger train of the plaintiff in error within the Canal Zone.

STATEMENT OF FACTS.

The facts as stated in the brief of the plaintiff in error are substantially correct, except that the statement therein, page 8, "..... and because of the injuries suffered by her"—as giving rise to a claim by defendant in error for damages by reason of any right of survival of

ary action his wife might have had for her suffering before her death, is incorrect. The plaintiff below, defendant in error here, specifically and unconditionally disclaimed and disavowed any such right of survival both on the argument of the demurrer and on the trial of the case. That such an allegation was inadvertently made in the ad damnum clause of the complaint is admitted; but, as above stated, was definitely disclaimed.

(Tr. pp.13-14.)

INTRODUCTION.

The case was tried below solely on the theory that Art. 2341 of the Civil Code of Panama in force in the Canal Zone, was a death act, on the model of the Employers Liability Act of 1906 and 1908 before the amendment thereto of 1910, and of Lord Campbell's Act following the amendment thereto of 1864, that is, that said Art. 2341, in the language of the common law, gave a new cause of action and was in no sense a survival act as is the amendment to the Federal Employers Liability Act of 1910. That is to say, the defendant could recover for the damages he personally sustained by reason of the death of his wife negligently occasioned. This theory was borne out by the judgment of the District Court of the Canal Zone and the affirmance thereof by the Circuit Court of Appeals for the 5th Circuit.

(Tr. p. 13-14, 168 et seq)

This case is of great importance to the residents of the Canal Zone, most of whom are American citizens and accustomed by the laws of the several States where they

maintain their legal domiciles to civil remedies based on liability and compensations acts. The employees of the Panama Railroad Company and the Panama Steamship Line are not ignorant of the Federal Employers Liability Act, or of section 33 of the Merchant Marine Act; nor are the employees of the Panama Canal unaware of the Federal Employees Compensation Act. P. R. R. Co. V. Minnix, 282 Fed. 47. Are they, the employees on the Canal Zone of the Panama Canal, the P. R. R. Co., and the P. R. R. S. S. Co., to be awarded damages or compensation for injury or death resulting therefrom and their wives, children and others not so employed, to go without a remedy for negligent injury resulting in death? We can not believe, in the light of the above very humane statutes, that any such interpretation will bear the scrutiny of disinterested justice. This court has already held, in two cases from the Canal Zone, that Art. 2341 gives an action for damages on account of negligent injury as well as for physical pain. "It (Physical pain) being a substantial and appreciable part of a wrong done, allowed for in the customary compensation which the people of the Canal Zone have been awarded in their native courts," and "..... could be allowed in a personal injury action by the District Court of the Canal Zone irrespective of whether the law of Panama, the lex loci, or that of the Canal Zone, the lex fori, controls."

P. R. R. Co. v. Bosse, 249 U. S. 41. 63 L. ed. 466;

P. R. R. Co. v. Toppin, 252 U. S. 308. 64 L. ed. 582.

We admit our inability, in the light of the above cases, to see wherein said Art. 2341 is not applicable to an action for death resulting from such injury, unless we are to read into a substantive principle of the Civil Law a Common Law doctrine, especially when, as in this case, the District Court of the Canal Zone and the Circuit Court of Appeals for the 5th Circuit have held, after a protracted trial in the District Court and petition for a rehearing in the Court of Appeals, that Art. 2341 did apply and gave such a right.

Tr. p. 40-129, and p. 176, 177

P. R. R. Co. v. Rock, 272 Fed. 649.

We are not, however, unmindful of the dissenting opinion in the instant case in the Court of Appeals, or of the decision of the same court in the case of Lebert v. Pac. M. Co. 249 Fed. 349. That opinion and the decision in the Lebert case are distinguishable, in this, that the grounds of both were not that Art. 2341 did not apply, but that the court had not been sufficiently informed how or in what manner it did apply.

ASSIGNMENTS OF ERROR.

For convenience, and since the assignments of error—Sec. 2 of Nos. 2 and 3 are identical in language and raise the same point, we will take them up first.

Section 2 of No. 2, is as follows:

"(2) Plaintiff's cause of action is one which does not survive under the laws of the Canal Zone."

(Brief of P in E. p 9.)

of the Spanish laws in civil matters under the jurisdiction of the general Government."

Historical Introduction to the Civil Code of the Republic of Panama Continued in Force in the Canal Zone, by Executive Order of May 9, 1904, p-6, Pars. 3, 4 and 5.

See also Preface to Walton's Civil Law of Spain and Spanish America, page VII, par. 1, Ed. 1900.

This assignment raises two questions. First there is no statute or law giving an action for wrongful death. Second, there is no statute or law specifying the party to sue in case of death. It is submitted that if there is no law giving an action for wrongful death, then the specification of a party to sue or the lack thereof is immaterial.

The quotations from the Introduction to our own Civil Code and the reference to Walton's Civil Law would seem to demonstrate that Art. 2341 of our Code is based on the substantially similar Art. of the Code Napoleon, which is as follows:

"Every act of man, that causes damage to another, obliges him by whose fault it happened to repair it."

Art. 1382 Code Napoleon, Fuzier-Herman Ed. 1896, Vol. 3, p-766, and cases cited thereunder.

This being true, a familiar canon of statutory construction is apropos to say the least, and especially so when quoted with approval by this Honorable Court:

"..... Indeed, under the settled intrepretation of the article of the Code Napoleon,

the right to recover for wrongful death is not dependent upon heirship or other relationship by consanguinity or affinity, but upon the ability to prove the existence of damage to the claimant arising from wrongful death. The doctrine is thus stated: 'The action brought to repair the damage caused by an accident, especially by an accident which has been followed by death, may be brought, not only by the heir of the victim, but also by anyone, whether heir or not, who has been directly injured by the consequences of the accident!'"

La Bourgogne, 210 U. S. 95, 139

We might with safety rest our case, in this phase of it, on the above quotations and the interpretation the French courts put on Art. 1382 of the Code Napoleon were it not for the fact that the plaintiff in error strenuously contends that the Spanish law is different, and further, because the Panama Civil Code designates no one who is authorized to bring such an action, that therefore it can not be maintained.

Art. 2341 of the Civil Code of Panama in force in the Canal Zone is as follows:

"He who shall have been guilty of an offense or fault, which has caused another damage, is obliged to repair it, without prejudice to the principal penalty which the law imposes for the fault or offense committed."

The language of this article is found in substance in all Civil Law countries, France as above noted, Spain, Chile, Colombia, Cuba, Porto Rico, the Philippines and

This was a motion for a directed verdict made at the close of plaintiff's case below. Thereafter, and during the ensuing trial of the case, defendant called several witnesses to testify in its behalf. This action, of course, waived said motion and any and all advantages claimed under it, if not made again at the close of all the evidence.

Rockford v Pa. Ry. Co. 174 Fed. 81.

School Dist. No. 11 vs. Chapman 152 Fed. 887 at 895.

(Tr. p–40.)

Section 2 of No. 3, is as follows:

"(2) Plaintiff's cause of action is one which does not survive under the law of the Canal Zone."

This was also a motion for a directed verdict, but unlike the former in that it was made at the close of all the evidence and, of course, brings before this court the question of any substantial evidence in support of the verdict.

School Dist. No. 11 Chapman, Supra;

Rockford V. Pa. Ry. Co. Supra.

We deny the application of said rule under this assignment for the very simple reason that there was no evidence one way or the other on the question. The overruling of defendant's demurrer and plaintiff's disclaimer of any claim of survival precluded all evidence on any such point during the trial.

(Tr. p. 13 et seq.)

Assignment of error No. 1, as follows:

"The court erred in sustaining the trial

court in having overruled plaintiff in error's demurrer to defendant in error's complaint."

That part of said demurrer relied on is as follows:

"..... under the substantive law of the Canal Zone there is no statute or law which confers an action for damages for wrongful death, nor does any statute or law specify the party who would be authorized to sue and recover therefor."

(Brief of P in E pp. 8, 9.)

The complaint in this action was filed under Art. 2341 of the Civil Code of Panama in force and effect within the Canal Zone by virtue of Executive Order of May 9, 1904, and is a translation of the Civil Code of Colombia —a replica of the Civil Code of Chile, which latter in turn, in so far as civil matters and private rights and remedies are concerned, is based on the French Civil Code.

"Speaking specifically of the Civil Law, it is to be noted that first the States, and then the Republic, accepted with some modifications the Civil Code of Chile....., which is based not only on the French Civil Code, but also on other bodies of laws, such as the old Spanish laws.

"The State of Cundinamarca adopted the Chilean Code in 1859;..... in 1860, by Panama ..... Finally all the other States replaced the old Spanish laws by the Code of Chile, with the modifications they thought proper, which, as a general rule, were insignificant.

"The Republic was the last to adopt this Code as it was not until 1873 that it took the place

others, and the interpretation of their courts on such articles, as we shall succinctly try to show, is the same as that of the French courts under Art. 1382 of the Code Napoleon.

"He that kills a man unjustly is bound to pay all expenses which may have been incurred for physicians and surgeons, and to give to those whom the person slain was from his relation accustomed to maintain—such as parents, wife and children, so much as their hope of that maintenance was worth, regard being had to the age of the person slain."

Grotius, Bk. 2, Ch. 17, Sec. 13.

"He who kills another unlawfully is obliged to defray such expenses as the person killed may have been at in endeavor to have his wounds cured. He is obliged, likewise, to make amends to those who had a right to be maintained by the deceased, such as his wife, his children, or his parents, according to the value of what they might have expected to receive from him, considering his age, his fortune or his employment."

Rutherford, Institutes of Natural Law,
Bk. 1, Ch. 177, Sec. 9.

"He who causes damage shall make reparation therefor to the person who received it, whether it had been done by himself or by his command or advice, or had happened through his fault."

Siete Partidas, Bk. 7, Tit. 15, Law 3.

In his commentaries on the Colombian Civil Code,

Dr. Velez, the standard authority in Colombia and Panama, says, in treating of Articles 2341 and 2342:

"Furthermore, there exist a multitude of acts and omissions which, without being exactly crimes or faults, carry responsibility for their author, because by them they cause damages to third parties and there is the necessity of repairing such damages. These acts are purely civil and not criminal, (because if they were criminal the resort would be to other legal provision), should be designated, as is done in the Code of Spain, 'obligations which arise from fault or negligence,' or, 'from illicit acts,' as the Code of Argentine expresses it, and not 'crimes and torts.' These obligations are founded on a principle of equity, because the rule is that he who causes damage to another is obliged to repair it.

"In conclusion, we say that the word 'crime' (delicto) in the language of our Civil Code, has a different significance from that which it has in the Penal Code. In the former it refers to every wrongful act by which a person knowingly or intentionally damages another. In the Penal Code it designates every infraction defined and punished according to that Code. All civil crimes do not constitute crimes under the Penal Code because the Penal law does not punish all of the acts which attack the rights of others, and vice versa."

Velez Commentaries, Vol. IX, pp-3-4.

and again:

"Crimes or negligence may cause damage to persons or to things. Art. 2342 refers to the damages caused to the latter (things) in order to determine who had the right to demand the in-

demnity. *If the damage be to the person, there are cases where the indemnity can only be demanded by the heirs as in case of homicide or murder.*" Italics ours.

(Id. p-11.)

Surely Grotius, Rutherford and Velez are credible commentators on the Civil Law, and the Siete Partidas speak for themselves. But further on.

Our task is somewhat lessened by the admission of the plaintiff in error that, " . . . . . recovery may be had in Spain, Cuba, and Porto Rico, ... in such a case as is the one under discussion," but attempts to avoid the effect thereof by claiming a dissimilarity in the statutes of those countries from our own, which is not a fact.

(Brief of P in E. p-14.)

It was held by the Federal court of Porto Rico, in the case of Torres vs. Ponce Ry. Co. 1 P. R. Fed. 476, that the Code of Porto Rico of 1902, did not render inapplicable the construction by the Supreme Court of Spain of the Spanish Civil Law applicable to Porto Rico in death cases. To the same effect is the case of Barrero v. The Electric Light Co. 1 P. R. Fed. 144, opinion by Holt, J. in part.

(Brief of P in E. p-15.)

At page 714 of the Judicial Register of Panama, for the year 1916, (which is the official reporter of the Supreme Court), appears the case against Brocc, Gonzales and Cordoba for homicide. They were condemned for having caused the death of one Higinio de Leon. The

trial Court condemned the accused to a term of imprisonment, without adding the additional penalties of disqualification from holding public office, confiscation of the weapon that caused the death and fixing the amount of damages to be paid to the heirs of the deceased. For this reason the Prosecuting Attorney appealed to the Supreme Court of Panama with the request that the sentence be properly reformed. The Supreme Court, in reforming the sentence, fixed a sum of two thousand five hundred dollars as "indemnity for damages to the heirs of Higinio de Leon." (y a pagar solidariamente, como indemnizacion de perjuicios a los herederos de Higinio de Leon la suma de dos mil quinientos balboas).

At page 433 of the same volume, for the same year, is the case against Antonio Vallarino for the killing of one Pedro Arias F. The Lower Court, in fixing the amount of damages to the family of Arias had struck an average between the sums recommended by the appraisors appointed to ascertain the damages, and had given judgment for the family of the deceased in the sum of $ 3,666.66. On appeal the Supreme Court disagreed with the right of the trial Court to so decide, and the majority of the Court said that the Court must be bound by the value of damages fixed by the majority of the appraisors (two out of three), and changed the sum awarded to the family of the deceased to that figure. One of the justices, Justice Lombardi, wrote a dissenting opinion, the closing paragraphs of which are as follows:

"All persons who have intervened in this cause agree that the valuation of the damages has

been wrongly made. Quid juris in this case? It is not possible to remake the appraisement nor is it possible to adopt an arithmetical average because there is a disparity between the appraisors, since two have agreed; nor is it legal that the Court should arbitrarily fix the amount of the damages because that would be equivalent to constituting itself a third arbitrator. In this conflict it appears that the most equitable solution is to make no condemnation for the payment of damages and send the parties to an ordinary civil suit for this sole purpose.

"As a majority of the Court does not find itself in accord with my judgment as to the manner of adjudging this case, I do not concur and am of the opinion that Antonio Vallarino should be condemned to suffer fifteen years imprisonment and that the damages should be fixed in an ordinary civil suit."

Registro Judicial de Panama, de 1916, p-441.

On this phase of the case, our own Supreme Court has spoken in no uncertain terms in the Toppin case, and in that case as in the instant case the empresario or company is sued and not the crew of the train who might have been held criminally liable for this death. We quote:

"There seems to have been a rule of practice under the Colombian Code (Article 1501) by which, if the civil action and the criminal action arising out of the same acts are not brought at the same time, the civil action cannot be prosecuted until the conclusion of the criminal action with the condemnation of the delinquent. But such rule obviously can have no application here; among

other reasons because it refers to the case where the same person is liable both civilly and criminally. Here it is the engineer who is liable criminally under the Police Code and the company against whom civil liability is being enforced."

P. R. R. C. v. Toppin, 252 U. S. 308.

But to avoid the only reasonable conclusion from these decisions, the plaintiff in error says in part at page 16 of his brief:

"There is no section of the Penal Code of the Canal Zone even approximating the provisions of Section 123 of the Penal Code of Porto Rico and Spain above quoted by Judge Holt."

In answer to this statement we beg to state that the procedure of Panama and Colombia, which was the procedure for the Canal Zone before September 3, 1904, is exactly the same as the Spanish and Porto Rican procedure referred to by Judge Holt.

Art. 2341 of the Civil Code of Panama in force in the Canal Zone is still in force in Colombia and was in force in Panama until the year 1917, when that country adopted a new Civil Code, in which Art. 1644 is practically identical with Art. 1902 of the Civil Code of Spain, Cuba, and the old Code of Porto Rico, and Art. 2341 of the Civil Code of Colombia and our own.

The following section of the Colombian Code of Civil Procedure which is still in force in Colombia and Panama was in force in the Canal Zone until September 3, 1904:

Book III, Sec. 261. (Art. 113 of Law of 1887), which prescribes the procedure of assessing civil damages

in criminal suits by 'peritos' or appraisors, the same as outlined in the dissenting opinion of Lombardi, J., supra. And also the following:

> "Art. 39 of Law 169 of 1896: The civil action for the reparation of damages may be instituted in the same criminal proceedings, without the necessity of constituting himself the accuser, and it will be decided in the judgment that puts an end to the criminal case.
>
> It may also be instituted separately before the proper judge, and in such case the civil action will remain in suspense until the criminal action has been definitely adjudged, regardless as to whether it has been instituted prior or subsequent to the institution of the criminal action. But for torts (the text in Spanish says, 'causa delictos o culpas') the civil action for damages may be instituted without any dependency upon the criminal action."
>
> See Opinion of Bryan, J., Tr. p-170-171.

This Law of 1896 is too plain for cavil and settles once for all the manner of instituting suits or actions for civil damages arising from torts. If more were needed we would call the court's attention to Articles 2358 and 2359 of the Civil Code of Panama and the Canal Zone; and although these articles may be properly designated statutes of limitation or prescription, they are yet pregnant with meaning and serve to throw light on just what is the intent of Art. 2341.

CONCLUSION.

That the laws of all Civil Law countries, Rome, Spain, France, and Spanish America, bear out our conten-

tion, is respectfully submitted. That when Art. 2341 of the Civil Code of Panama and the Canal Zone is interpreted in consonance with those laws, in the language of common law lawyers, it is nothing more than a death act, the same as Lord Campbell's Act and the Federal Employers Liability Act of 1906 and 1908, and not in any manner or form a survival act; and except that instead of requiring the action to be brought by the personal representatives for certain beneficiaries, suit is brought "not only by the heir of the victim, but also by anyone, whether heir or not, who has been directly injured by the consequences of the accident," the accuser in a criminal action or the same person as plaintiff in a civil action.

La Bourgogne, supra;
Art. 39 of Law 169 of 1896, supra.
Velez, supra.

That the contentions of plaintiff in error have been successfully met and that the judgment of the U. S. Circuit Court of appeals for the 5th Circuit should be affirmed, is respectfully submitted.

WILLIAM C. TODD,
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Cristobal, Canal Zone.

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3. In view of the Spanish affinities of the South American countries that adopted this article,—first Chile, then the States of Colombia, including Panama, which apparently took it from Chile,—it is to be assumed that it was adopted from a like provision in the Spanish Code rather than from another in the Code Napoleon. P. 212.
4. Hence an earlier French construction sustaining a private action for death caused by negligence can not be presumed to have been adopted with the statute, and the more clearly so in the absence of ground to infer that the adoption was with knowledge of such construction. *Id.*
5. In the absence of construction by Spain prior to the adoption by Chile, by Chile prior to the adoption by Panama and by Panama or Colombia prior to the adoption for the Canal Zone, the article must be independently construed, according only persuasive force to decisions of the Spanish-speaking countries. P. 213.
6. The Executive Order and the Act of 1912, having continued in force in the Canal Zone the laws of the land "with which the inhabitants are familiar," the population there having immediately become largely American, and the local courts having adopted common-law principles in construing statutes, the article should be construed in accordance with the common law, as not granting a private cause of action for death by negligence. P. 214.

272 Fed. 649, reversed.

ERROR to a judgment of the Circuit Court of Appeals, which affirmed a judgment recovered by Rock in the District Court for the Canal Zone for damages resulting from the death of his wife, due, as it was alleged, to negligence of the Railroad Company.

Mr. Walter F. Van Dame for plaintiff in error.

Mr. William C. Todd for defendant in error.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is an action brought in the District Court for the Canal Zone by James Rock to recover damages for the death of his wife, alleged to have resulted in 1918 from the negligence of the railroad company, while she was being

transported as a passenger. Upon the verdict of a jury, final judgment was rendered for plaintiff, which was affirmed by the Circuit Court of Appeals. 272 Fed. 649. The sole question presented for our determination is whether, under the law of the Canal Zone then in force, there was a right of action.

It is settled that at common law no private cause of action arises from the death of a human being. *Insurance Co.* v. *Brame*, 95 U. S. 754, 756. The right of action, both in this country and in England, depends wholly upon statutory authority. *Dennick* v. *Railroad Co.*, 103 U. S. 11, 21; *Seward* v. *The "Vera Cruz"*, L. R. 10 App. Cases 59, 70. This Court, also, after elaborate consideration, held that no such action could be maintained in the courts of the United States under the general maritime law. *The Harrisburg*, 119 U. S. 199. And the general rule of the Roman civil law seems to have been the same as that of the common law. Such was the conclusion of the Supreme Court of Louisiana in a case which was discussed with great fullness and learning at the bar and well considered by that court upon its original presentation and upon rehearing. *Hubgh* v. *New Orleans & C. R. R. Co.*, 6 La. Ann. 495, 509–511.

But it is contended that the action is maintainable under Art. 2341 of the Civil Code of Panama, which became operative in the Canal Zone by Executive Order of May 9, 1904. That article reads:

"He who shall have been guilty of an offense or fault, which has caused another damage, is obliged to repair it, without prejudice to the principal penalty which the law imposes for the fault or offense committed."

The applicable passage of the Executive Order is, "The laws of the land, with which the inhabitants are familiar, and which were in force on February 26, 1904, will continue in force in the Canal Zone . . . until altered or annulled by the said Commission. . . ."

The Act of Congress of August 24, 1912, c. 390, § 2, 37 Stat. 560, 561,[1] had the effect of confirming this article as valid and binding within the Canal Zone.

The provision under consideration apparently was adopted from the Code of Chile by the several States of Colombia, the adoption by Panama being in 1860. The contention is that the provision in the Chilean Code, in substance, was taken from the Code Napoleon and is to be found, also, in the Civil Code of Spain; that both the French and the Spanish courts had interpreted it as justifying an action such as we are here reviewing; and the familiar rule is invoked that a provision adopted by one country from the laws of another country is presumed to carry with it the meaning which it had acquired by the known and settled construction of the latter. Undoubtedly the decisions of the French courts were to the effect stated. *La Bourgogne,* 210 U. S. 95, 138. It must be borne in mind, however, that the South American countries named were predominantly Spanish in race and language, and, therefore, it may scarcely be doubted that the statute was taken directly from the Spanish and not the French Code. It follows that the presumption that the French construction was adopted with the adoption of the statute cannot be indulged. *Texas & Pacific Ry. Co.* v. *Humble,* 181 U. S. 57, 65. Moreover, there is nothing in any of the circumstances called to our attention to support an inference that the statute was adopted with knowledge of the French construction. See *Hunter* v. *Truckee Lodge,* 14 Nev. 24, 38–40. The earliest decision of the Spanish courts of which we are informed was in 1894, *Borrero* v. *Compañia Anonyma de la Luz Elec-*

[1] "That all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide."

trica, 1 Porto Rico Fed. 144, 147, long after the adoption of the statute by either Chile, Colombia or Panama. The presumption in respect of the adoption of the Spanish construction, therefore, has no foundation upon which to rest and must, likewise, be rejected. *Stutsman County* v. *Wallace*, 142 U. S. 293, 312.[2] We are not advised that the courts of Chile had construed the provision prior to its adoption by Panama; and it is asserted and not denied, that prior to its adoption by the Executive Order and congressional act, there had been no decision on the question by the courts of either Colombia or Panama.

It remains, then, only to inquire whether the asserted right of action exists in virtue of the language of the statute independently construed. Upon that question decisions of the various Spanish-speaking countries are of persuasive force only; and even that is overcome or greatly diminished when it is shown that the cognate statute in Porto Rico, and, for aught that appears to the contrary, in the other Spanish-speaking countries, is supported by procedural or other provisions lending aid to its construction as a death statute. In the *Borrero Case* (p. 146) it is said:

"Under the practice formerly existing in Porto Rico, in a proper case the law provided for, not only criminal proceedings, but for indemnification on account of the unlawful act to those entitled to it, all in the same proceeding; but those entitled to the civil indemnity could decline to proceed with the criminal action, and yet sue for civil liability. Article 16 of the Penal Code provided that one liable for a misdemeanor was also liable civilly. Both the penal and civil liability could be determined in the same proceeding; and article 123 provided: 'The ac-

[2] We have the authority of the *Hubgh Case* for the statement that the earlier Spanish law was to the contrary effect. 6 La. Ann. 510-511.

tion to demand restitution, reparation, or indemnification is also transmitted to the heirs of the person injured.'"

The Supreme Court of Louisiana in the *Hubgh Case, supra*, considering the similar provision in the Louisiana Code, held that it did not include a civil action for death. This conclusion was reached after submitting the language to the test of civil law as well as common law principles.

The Executive Order continued in force in the Canal Zone the laws of the land "with which the inhabitants are familiar;" and this, in effect, was ratified by the Act of Congress of 1912. Immediately following, the native population disappeared and the inhabitants of the Canal Zone since, largely American, have been only employees of the Canal and of those doing business in the Zone, who, it is to be presumed, were familiar with the rule of the common law rather than the construction said to have been put upon the statute by the various Spanish-speaking countries. As early as 1910, the Supreme Court of the Canal Zone declared that the courts of the Zone were "in duty bound to follow the rules of statutory construction of the courts of common law and ascertain by them the meaning and the spirit of the codes." *Kung Ching Chong* v. *Wing Chong*, 2 Canal Zone Supreme Court, 25, 30. In the later case of *Fitzpatrick* v. *The Panama Railroad Co.*, Id. 111, decided in 1913, the same court said (p. 121): ". . . . if there is doubt or uncertainty as to the construction and interpretation of the laws here existing prior to February 26, 1904, the courts of the Canal Zone should accept and adopt that construction which more clearly harmonizes with the recognized principles of jurisprudence prevailing in the United States."

Under all the circumstances, we conclude that the reach of the statute is to be determined by the application of common law principles, *Panama R. R. Co.* v. *Bosse*, 249 U. S. 41, 45; and, applying these principles, it is clear that the general language of Art. 2341 does not include the

right of action here asserted. It would not be difficult to find generalizations of the common law quite as comprehensive in terms as the provision now under review—as, for example, "There is no wrong without a remedy";[3] but, nevertheless, under the principles of the common law, it has required specific statutes to fix civil liability for death by wrongful act; and it is this requirement, rather than the construction put upon the statute in civil law countries, that the inhabitants of the Canal Zone are presumed to be familiar with, and which affords the rule by which the meaning and scope of the statute in question are to be determined.

Judgment reversed.

MR. JUSTICE HOLMES, dissenting.

There is no dispute that the language of the Civil Code of Panama, Art. 2341, which has been quoted, is broad enough on its face to give an action for negligently causing the death of the plaintiff's wife. Taken literally it gives such an action in terms. The article of the Code Napoleon from which it is said to have been copied is construed by the French Courts in accord with its literal meaning. *La Bourgogne*, 210 U. S. 95, 138, 139. It would seem natural and proper to accept the interpretation given to the article at its source, and by the more authoritative jurists who have had occasion to deal with it, irrespective of whether that local interpretation was before or after its adoption by Spanish States, so long as nothing seriously to the contrary is shown. The only thing that I know of to the contrary is the tradition of the later common law. The common law view of the responsibility of a master for his servant was allowed to help in the interpretation of an ambiguous statute in

[3] The maxim was applied in *Like* v. *McKinstry*, 41 Barb. 186, 188, to support a right of action for slander of title to personal property.

Panama R. R. Co. v. *Bosse*, 249 U. S. 41, 45, for reasons there stated. But those reasons have far less application here, even if we refer to the common law apart from statute, and in any case are not enough to override the plain meaning of statutory words.

The common law as to master and servant, whatever may be thought of it, embodied a policy that has not disappeared from life. But it seems to me that courts in dealing with statutes sometimes have been too slow to recognize that statutes even when in terms covering only particular cases may imply a policy different from that of the common law, and therefore may exclude a reference to the common law for the purpose of limiting their scope. *Johnson* v. *United States*, 163 Fed. 30, 32. Without going into the reasons for the notion that an action (other than an appeal) does not lie for causing the death of a human being, it is enough to say that they have disappeared. The policy that forbade such an action, if it was more profound than the absence of a remedy when a man's body was hanged and his goods confiscated for the felony, has been shown not to be the policy of present law by statutes of the United States and of most if not all of the States. In such circumstances it seems to me that we should not be astute to deprive the words of the Panama Code of their natural effect.

The decision in the *Hubgh Case*, 6 La. Ann. 495, stands on nothing better than the classic tradition that the life of a free human being, (it was otherwise with regard to slaves,) did not admit of valuation, which no longer is true sentimentally, as is shown by the statutes, and which economically is false.

I think that the judgment should be affirmed.

The CHIEF JUSTICE, MR. JUSTICE MCKENNA and MR. JUSTICE BRANDEIS concur in this opinion.

PANAMA RAILROAD COMPANY *v.* ROCK.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 4. Submitted October 6, 1924.—Decided November 17, 1924.

1. At common law no private cause of action arises from the death of a human being, and such, it seems, was also the general rule of the Roman civil law. P. 211.
2. Article 2341 of the Civil Code of Panama, which reads: "He who shall have been guilty of an offense or fault, which has caused another damage, is obliged to repair it, without prejudice to the principal penalty which the law imposes for the fault or offense committed,"—was made operative in the Canal Zone by Executive Order of May 9, 1904, and confirmed as valid and binding there by the Act of August 24, 1912, § 2, 37 Stat. 500. P. 211.